SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

NO. 190.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY ET AL.,

Plaintiff in Error,

vs.

THE PATTEN PAPER COMPANY (LIMITED), THE KAUKAUNA WATER POWER COMPANY ET AL.,

Defendants in Error.

BRIEF UPON MOTION TO DISMISS.

This case presents this singular state of facts:

When the original action was commenced the Green Bay and Mississippi Canal Company was owner of a water power created by the government dam and canal, A. B. C. D. E. F. G., shown on plaintiff's Exhibit "A 1," of which a reduced skeleton copy is enclosed herein. It was also owner of the north bank of the river from the head of the government dam E. to the lower line of Section 24, at F., and of the undivided half of the water front from that point to the down stream line of the south half of private claim No. 1, at I., and had been so possessed thereof since its organization, and its grantors had been possessed since 1855, when the dam and canal were built, and since 1860 it and they had been leasing all the water from that pond through that canal, to be used over the front of private claim one, through the mills of its tenants, until at the

time of the bringing of the suit its tenants were using under such leases 2,500 horse power of water, and no one had ever set up a claim against that right. The Canal Company also claimed the right to draw all the water of the river from the pond into its canal and use the same and lease it to others to be used. And yet by the final judgment and order all that water power is taken away from the company and its property rendered useless.

The company's title to said bank and said canal and to draw the water through said canal and lease it to its tenants, was specially set up by the plaintiff in the original complaint as part of the foundation of the plaintiff's right of recovery. Its title to said shore of the river and to the canal and the fact that it was and had long been leasing such water was set out in its cross-complaint, and it was specially set out and admitted and set up as a defense to the cross-complaint in the answer of each of the defendants in error, the Kaukauna Water Power Company and the Hewitts and their tenants, and relied upon as a defense to the claim of the Canal Company in its cross-bill that it owned the entire water power of the river on this rapid.

That right has not been attacked in any pleadings in the case, and nowhere, except in the remittitur of the Supreme Court upon reversal of the judgment of 1894 upon appeal of the defendants in error from a part of that judgment, by the judgment of the Superior Court in obedience to the order in that remittitur contained, and by the final order of the Supreme Court dismissing the appeal of the plaintiff in error from that judgment.

Neither the Supreme Court nor the Superior Court had jurisdiction in the case to make and enter either of said orders or judgment by reason of the limited character of the appeal from the judgment entered January 19, 1894.

The pleadings being so, the proofs made mostly by the defendants in error are full and complete that the pleadings stated the absolute facts, and yet by that order, that judgment and the dismissal of the appeal of the Canal Company therefrom, the water power of the Canal Company as riparian owner was cut in two at the spill dam on the river at "E," and the Canal Company was required to return the water from the river substantially at that point, so that it would no longer come to the mills of the tenants of the Canal Company between "F" and "G," and, inasmuch as there is no land upon which to build mills above "F," the water power of the Canal Company, which is of the value of at least $150,000, was substantially destroyed. More than that, the mills of its

tenants between F and G on the map, worth more than $200,000, were rendered nearly useless.

It will be necessary to examine the pleadings, the findings and judgments and appeals and subsequent proceedings to some extent, and I have printed enough of them for that purpose.

The original complaint (page 25, record) avers the corporate existence of the plaintiff and the corporate defendants; that the Fox river is a public river; that its flow is about 300,000 cubic feet of water per minute; that where it passes between Sections 21 and 22, south of the river, and 24 and private claim one, north of the river, it is divided into several separate channels by four islands. (Page 26.)

That Islands No. 4 and 3 divide the stream into three channels, north, south and middle; that in a state of nature and before the interruption or diversion of any of said channels into which said river is divided, about five-sixths of the flow of the river passed and ran through the channel north of Island No. 4 and about one-sixth thereof through the channel south of Island No. 4, and about one-half of the flow of the river ran through the channel between Island No. 3 and the north shore of the river, which is the north channel proper, and about one-third of the flow of the river ran in the middle channel; that Meade and Edwards, in 1879, built a dam between Islands No. 3 and 4, which created a pond, upon which the Patten Paper Company, the plaintiff, had a mill (page 27), to which mill the water power was necessary.

That the other complainants, the Fox River Pulp and Paper Company and Union Pulp Company, also had mills on said middle channel. (Page 28.)

That Kelso was the owner of a mill on the middle channel. (Page 29.)

That a dam had been built across said Fox river, about 100 rods above the head of Island No. 4, and that the defendant, the Kaukauna Water Power Company, had built a wide and deep channel from the mill pond above said dam, in line with and south from the south bank of said river, to a point below Island No. 4; that said canal is large enough to pass and is intended to pass half of the flow of the river; that there are no openings from the canal into the river to return the water to the river above Island No. 4, so that the same can flow into the middle channel; that it is the intention of said Kaukauna Water Power Company to draw from said river above said dam the half of the flow of said river and pass the same through said canal and through the mills and factories of itself and its lessees into the river at a point below Island No. 4, so that the same can not pass into the middle channel. (Page 29.)

That that half includes the one-sixth appurtenant to the south channel and the one-third appurtenant to the middle channel, and which should of right flow and come into the mill pond furnishing the water to the mills of the plaintiffs, and that the Kaukauna Water Power Company threatens to pass, and unless restrained by this Court will so draw and pass said half of said stream so as to deprive the plaintiffs of the use thereof and of the use of their mills. (Page 30.)

"13. That the Green Bay and Mississippi Canal Company has a canal leading from the said mill pond maintained by said dam across Fox river above said Island No. 4, along in line with and north of the north bank of said Fox river, to a point below the head of Island No. 3; that such canal is large enough to pass and is intended to pass at least one-half of the flow of said river, and to pass the same down said canal and into the said river at a point below the head of Island No. 3, so that the same can not run and pass into said middle channel, and during the summer has so drawn and passed about half the flow of said stream.

14. That the Green Bay and Mississippi Canal Company and its lessees and tenants are and have for several years been and propose to and will continue drawing and passing through their canal on the north side of the river from the mill pond maintained by the dam above said Island No. 4 to a point below the head of Island No. 3, and so that it can not pass into the middle channel and into the mill pond furnishing water to the plaintiff's mills about one-half of the flow of the Fox river and the half appurtenant to said north channel. (Page 30.)

That Matthew J. Meade and the Green Bay and Mississippi Canal Company, Harriet S. Edwards and George F. Kelso are owners or claim some interest in the flow of water through the middle channel, and are united in the interest herein with these plaintiffs, but that they refused to unite with the plaintiffs in this action. (Page 31.)

It also sets up the title in the islands at page 32.

That the undivided one-fourth of Island No. 3 belongs to the Green Bay and Mississippi Canal Company, one-fourth to Edwards, one-half to Meade and the head of the island to Hewitt, and sets up the title to Island No. 4, one-fourth in the Canal Company, one-fourth to Edwards, a part of one-half to the Kaukauna Water Power Company and the rest in Meade. (Page 32.)

That the Kaukauna Water Power Company is the owner of the south side of the river, from above the head of Island No. 4 to below the head of Island No. 1.

"That that part of fractional Section 24 bordering on said north channel is owned by the Green Bay and Mississippi Canal Company.

28. That that part of private claim No. 1 bordering on said north channel is owned by the Green Bay and Mississippi Canal Company and Henry Hewitt, Jr., and William P. Hewitt."

And sets up the title to the remaining shores of the river, which is not material to be considered on this motion. (Page 33.)

And prays judgment determining and adjudicating what share or proportion of the flow of said Fox river, where the same passes Islands No. 3 and 4, in Township 21 North, of Range 18 East, is appurtenant and of right should be permitted to flow in the south, middle and north channels of said river respectively.

"Second. Restraining the Kaukauna Water Power Company * * * from drawing from said Fox river, above the head of Island No. 4 and carrying around and below the head of Island No. 4, so that the same shall not come into the middle channel of said river, and into the mill pond of these plaintiffs, called the Meade and Edwards water power, more water, flow of said river, than the one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in said south channel of said river, and that the Kaukauna Water Power Company pay the costs." (Page 34.)

ANSWER OF KAUKAUNA WATER POWER COMPANY.

The Kaukauna Water Power Company and the other defendants, its tenants and mortgagees, answered said complaint,

"And denied that the principal part of the flow of said Fox river in a state of nature passed or ran through the channel north of said Island No. 4. They state about one-half of the flow of said river in a state of nature and before any interruption or diversion thereof ran and passed through the channel south of said Island No. 4, and that about one-half of the flow of said river in a state of nature and before any interruption or diversion thereof passed and ran through the channel north of Island No. 4, down to the mouth of the middle channel, or the channel between Islands No. 3 and 4, where said last mentioned half divided and about one-third thereof or one-sixth of the whole flow of the river passing into and through said middle channel and the remainder of said flow passing on down the said north channel around the north side of said Island No. 3 and 2 to slack water." (Page 130.)

They further plead:

"And these defendants deny that the one-half of the whole flow of Fox river, which said defendant Kaukauna Water Power Company is charged in the 11th and 12th paragraphs of

said complaint with taking or intending to take in its said canal, includes one-third or any other part of the flow of said river appurtenant to or belonging to said middle channel.

And these defendants deny that they or either of them have ever drawn or taken through or into said canal of the Kaukauna Water Power Company any more water than belonged to and of right should have flowed in or down the said south channel of said Fox river. (Page 134.)

And they deny that they threaten or intend to carry or pass through the canal of said Kaukauna Water Power Company more than one-half of the flow of said Fox river, and they allege that they have lawful right to take into and pass through said canal one-half of the flow of said river. (Page 134.)

And these defendants, further answering, say that the canal mentioned in paragraphs 13 and 15 of said complaint is owned by the United States of America, and that the Green Bay and Mississippi Canal Company does not own the same so far as is necessary for the maintenance and use of the same for hydraulic power or otherwise. (Page 134.)

And these defendants deny that the part of said fractional Section No. 24 bordering on said north channel of Fox river is owned by the said Green Bay and Mississippi Canal Company, and, upon information and belief, state that the same is owned by the United States of America."

There were other denials, upon information and belief, in said answer, but none of which are material to the decision of this motion.

ANSWER AND CROSS-COMPLAINT OF THE GREEN BAY AND MISSISSIPPI CANAL COMPANY.

The Green Bay and Mississippi Canal Company answered the complaint at page 64, in which they substantially admitted all of the allegations of the plaintiff's complaint material to be considered upon this motion, but they also set up by a pleading, which it was stipulated, at page 61, "may stand and be answered or demurred to the same and with the same effect as if accompanied by or if it were in form a cross-bill or cross-complaint, setting up formally the same matters now stated in said answer, and that said answer may be treated and considered by the other parties to this suit, who have appeared or answered therein, as if accompanied by a cross-complaint in due and proper form," in which they plead the act of Congress of August 8, 1846, granting lands to the state on its admission into the Union, in trust for improving the navigation of said Fox and Wisconsin rivers, the acceptance of said grant by the act of June 29, 1848, and the act of the Legislature of August 8, 1848, Sections 15 and 16 of which are as follows:

"Sec. 15. In the construction of such improvements the said board shall have power to enter on, to take possession of and use all lands, waters and materials, the appropriation of which for the use of such works of improvements shall in their judgment be necessary.

Sec. 16. When land, waters or materials appropriated by the board to the use of said improvements shall belong to the state, such lands, waters or materials and so much of the adjoining land as may be valuable for hydraulic or commercial purposes shall be absolutely reserved to the state, and whenever a water power shall be created by reason of any dam erected or other improvement made on any of said rivers, such water powers shall belong to the state, subject to future action of the Legislature."

"That one of the rapids in said river, below Lake Winnebago, around which it was necessary to secure slack water navigation, by means of dams, locks and canals, and of which the water power to be created therein was so appropriated by the state, is located at the point where the said Fox river flows between the sections and private claims aforesaid, and is commonly known and hereinafter in this answer is designated as the Kaukauna rapids. (Page 86.)

"That at the time the state began this work of improvement no person had the right to build a dam across said river and the state has never authorized any person or corporation to build and maintain a dam across said river at that point, save this defendant and its grantors.

That the state determined to build a low dam beginning on the south side near the head of the rapids, extending down stream on or near the south bank of the river across lots 8, 7, 6 and onto lot 5 of said Section 22, and thence extending at about a right angle with the south bank nearly across the river, leaving an opening at the north end through which the whole water of the river could pass, and thence further extending down the bed of the river parallel to and in part near to and in part on the north bank to a certain point at which should be placed a lock proper, leaving between such last mentioned extension of the dam on said north bank a channel sufficiently large to fully pass the ordinary flow of the river, and which dam, by the aid of such lock, should uphold and sustain the water of said river throughout the full extent of said dam at one and the same level. (Page 87.)

And from said lock it was determined to construct with locks a canal on said north bank extending down stream and into the river at the foot of the rapids, through which locks and canal boats could be passed and around such locks, including the lock at the end of said dam, to construct sluices or sluice-

ways, through which sluiceways and through said locks and canals all of the waters of the river not used on the upper level in an ordinary stage could be discharged from level to level into the river below. That in accordance with such plans the State of Wisconsin, in part, and its grantee, the Fox and Wisconsin Improvement Company, did construct and complete the improvement of said river at Kaukauna rapids in all respects fully as the same was planned and determined upon, and did build said dam with extensions and lock at the end thereof at the place and in the manner so contemplated and without any openings on the south side of the river, so as wholly to prevent the use of the water power created by said dam on the south side of the river, and did construct the channel between the lower extension of the dam on the north bank of the river down to the lock at the end thereof of sufficient capacity to pass the ordinary flow of the waters of the river, and did construct with locks a canal extending from the foot of the lock at the end of the dam along the north bank down into the river below said rapids, and build said locks with sluices or sluiceways around the same, whereby through said canal locks and sluiceways all of the water of said river at an ordinary stage could be passed, and partly prior to the fall of 1855 and partly early in 1856 did acquire, by purchase and otherwise, lands for the location of said dam and canal thereon, and particularly for the utilization thereon of the water powers created by said dam and canal, which lands last mentioned lie and so far as material to this action are particularly described as follows, to-wit:"

Here follows a description of the lands E, O, G, I, J, F, on the map. (Page 88.)

"That the dam and canal in question were constructed in the most part by Morgan L. Martin, under a contract made with the State in 1851, which work was continued by the said Martin after the work of improvement had been granted to the Fox and Wisconsin Improvement Company, and were so constructed and finally completed under the act of the Legislature of Wisconsin approved Aug. 8, 1848, and the acts of the Legislature subsequent thereto, other than which there was no authority for building and maintaining the same, and the same were contemplated in compliance with the report of D. C. Jenne, engineer, and all respects were so constructed and completed as the same remain and now are, except as to a slight change in part of said dam made by the United States as hereinafter mentioned." (Page 90.)

It then avers subsequent proceedings by which the powers and title of this State to this whole work of improvement and the land grant passed to the Fox and Wisconsin Improvement Company, and the title of the Fox and Wisconsin Improve-

ment Company passed to the Green Bay and Mississippi Canal Company, and by which the Canal Company subsequently conveyed the grant above the line of water communication so constructed to the United States, by deed executed Sept. 18, 1872, found at page 58 of the record.

It further alleges:

"That to confine this defendant, the Green Bay and Mississippi Canal Company, to the use of the water power furnished by said dam, in such a way or manner as that all of the water so taken out of said mill pond can and will be returned into the main channel of said river immediately at the foot of said government dam (meaning thereby the foot of the north and south line of said dam), would render all of said water power practically valueless to the Green Bay and Mississippi Canal Company, the owners thereof, and to any and all other persons, and so destroy property of value of many thousands of dollars and prevent the building and operating of mills of value of hundreds of thousands of dollars. (Page 99.)

That by virtue of the right so acquired by this defendant now answering, it is the owner of all of the water power created by the government dam in question, and has the right to make exclusive use of the same at any point on its own lands where the same can be made available, and particularly at points or places on said dam, including its extension to said lock opposite Island No. 3 and the middle of Island No. 4, where it was contemplated by the Board of Public Works that the same should be used. (Page 97.)

It also set out the judgment of the Supreme Court of the State of Wisconsin in the case of the Canal Company vs. the Kaukauna Water Power Company, and others, decided in 70 Wis., page 635, and subsequently affirmed by this Court in 142 U. S., 254. (Page 100.)

"IT PRAYED judgment that any decree to be entered in this action determining and adjudicating what share or proportion of the flow of said river where the same passes Islands No. 3 and 4, in Township 21, of Range 18 East, is appurtenant and of right should be permitted to flow in the south, middle and north channels of said river,

shall be made subject to the right of the defendant herein answering to use all of the water power created by said government dam on its own lands on the north side of said river or elsewhere, as it shall see fit,

and that the apportionment of the flow of the river so to be made shall be confined to such part of the river, if any, as shall not be so used, and shall be permitted to flow in the channel of said river below said dam,

and for such other relief as shall be equitable

and prays costs against the Kaukauna Water Power Company. (Page 101, transcript.)

The title so set up by the Canal Company in its cross-bill to the whole of the water power produced by the rapids was denied, and the facts in said bill alleged as the foundation of such title were traversed by the Kaukauna Company and its tenants claiming under it, and by the original plaintiff and the defendants Hewitt, so that the cross-bill was fairly put in issue.

PLEA OF TITLE OF CANAL COMPANY.

The defendants in error, Kaukauna Water Power Company at page 163, Henry Hewitt at page 172, and William Hewitt at page 182, each made the following allegation as a defense to the claim of the cross-bill, viz:

"And these defendants further state that at the time of the making of all the aforesaid leases (which were leases of water power between the government canal on the north side and the river below), the Fox and Wisconsin Improvement Company or the Green Bay and Mississippi Canal Company were the owners of all of the land bordering on the north side of said Fox river and from above said government dam down to said lot one of Jenne's plat, and were also the owners of the undivided half of all of the land bordering on the north side of said Fox river from the upstream line of said lot one of said Jenne's plat down stream to a point a few rods below or down stream from the first lock now existing in said canal," etc. (Page 163, record.)

Testimony was taken and the case was removed from the Circuit Court of Outagamie County to the Superior Court of Milwaukee County, where it was tried.

STIPULATION.

During the trial the parties agreed "that by the fair result of the testimony in the case the natural flow of the river in the different channels was as follows: 43-200 in the south channel, 62-200 in the middle channel and 95-200 in the north channel, provided that this agreement shall be subject to whatever decision the Court may make upon the issues raised by the answer and cross-complaint of the Green Bay and Mississippi Canal Company and the several answers thereto." (Page 492, transcript.)

The trial Court sustained this claim of the Canal Company made in its cross-complaint, and filed the following findings of fact and conclusions of law:

FINDINGS OF FACT.

[TITLE OF CAUSE.]

This cause having been submitted to the Court upon the pleadings and proofs and upon argument of counsel, I find the following facts:

First. The ownership of the lands bordering upon the rapids of the Fox river at Kaukauna was at the time of the filing of the complaint as alleged in the complaint.

Second. The plaintiffs were at the commencement of this action and still are the owners and lessees of mills situated on the Meade and Edwards power, on the middle channel of the Fox river at Kaukauna, substantially as alleged, and which mills could not and can not be run without water power, and the use of which mills with the water to which they are entitled, is of great value to the plaintiffs as alleged, but the exact value is not found, the same being immaterial because of the waiver of damages in this action.

Third. By nature there flowed in the south channel of said river at said Kaukauna rapids 43-200 of the whole flow of the river, and in the middle channel 62-200 thereof, and in the north channel 95-200 thereof.

Fourth. That at the commencement of this action the Kaukauna Water Power Company, by its servants, agents and lessees, diverted from the river above the head of Island No. 4, and so that the same could not pass into the middle channel of the river, wherein plaintiffs' mills are situated, or north of Island No. 4, more than 43-200 of the flow of the river.

Fifth. That the State of Wisconsin, under and by virtue of an act of the Legislature of the State of Wisconsin, approved August 8, 1848, entered upon the improvement of the Fox and Wisconsin rivers and prosecuted such improvement up to some time in the year 1853, when the Fox and Wisconsin Improvement Company was incorporated and the work of improvement of those rivers turned over to that company.

Sixth. That afterwards that company prosecuted the work of improvement and maintained the same as constructed by the State, and by it substantially as shown by the Plaintiffs' Exhibit "A 1," up to the time of the sale of the works of improvement to the trustees and the organization of the Green Bay and Mississippi Canal Company, when the same was turned over to that company, and that the Green Bay and Mississippi Canal Company completed said work of improvement and have since maintained the same up to the 18th of September, 1872, when said company conveyed to the United States of America, by deed bearing date on that day, "all and singular its (the said Green Bay and Mississippi Canal Company's) property and rights of property to the line of water communi-

cation between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises, saving and excepting therefrom and reserving to the said party of the first part the following described property, rights and portions of franchises, which, in the opinion of the Secretary of War and of Congress, are not needed for public use, to-wit: * * * Second. Also (saving and reserving) all that part of the franchises of said company, namely, the water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto and the lots, pieces or parcels of land necessary to the enjoyment of the same and those acquired in reference to the same."

Seventh. That the Fox and Wisconsin Improvement Company, so long as it had the control of said work of improvement, leased so much of the water power created by said dam, to be drawn from the arm of the dam or canal as it was able to lease for the best rents thereof it could obtain; that it became and was the absolute owner by grant from the state.

Eighth. That since, down to the trial of this action, the Green Bay and Mississippi Canal Company has leased all of the water power from the pond created by said dam and said canal or arm of the dam, to be used over the water power lots abutting on said canal and shown on the Plaintiff's Exhibit "A. 1," which it could find customers for, at the best rent it could obtain, and at the date of the trial it was leasing, to be used from said canal, more than 2,500 horse power of water on the north side and was permitting the defendant, the Kaukauna Water Power Company, to use more than 2,600 horse power on the south side, and that the water power thus controlled and leased by it passed to it by purchase on foreclosure of mortgage, a trust deed given by the Improvement Company.

Ninth. That the remainder of the flow of said river was permitted to spill over the dam and to pass down the river.

Tenth. That the river below the dam is divided by islands into three channels, called respectively the south, middle and north channels of the river.

That 43-200 of the whole flow of the river below the dam passed in a state of nature through the south channel, and 62-200 of the whole flow passed through the middle channel, and 95-200 of the whole flow of the river passed through the north channel.

CONCLUSIONS OF LAW.

And as conclusions of law I find that under the deed of September 18, 1872, the United States are bound to maintain the dam and canal so as to furnish to the Green Bay and Missis-

sippi Canal Company all the surplus water from said pond not required for navigation at such points on said canal as said Canal Company should desire to use the same.

Second. That the maintaining of such dam and canal by the United States and supplying the water flowing therein to the Canal Company is in execution of such agreement, and that the Canal Company is entitled to use or lease to others all of the surplus water from said pond not necessary for navigation, to be drawn through said canal or directly from said pond, to be used for water power at such point or place on the canal or elsewhere as it shall see fit.

Third. That the plaintiffs are entitled to judgment that of the water permitted by the United States and the Green Bay and Mississippi Canal Company to flow in said river below the dam and above the head of Island No. 4, 43-200 thereof should of right flow down the south channel, and 157-200 thereof down the main channel, north of Island No. 4, and that of the water so permitted to flow down the main channel, north of Island No. 4 and above the middle channel, 62-157 thereof should of right flow down the middle channel and south of Island No. 3, and 95-157 thereof down the north channel or north of Island No. 3.

Fourth. That the Green Bay and Mississippi Canal Company is entitled to have and recover judgment against all the other parties in the action; that it is entitled to all the surplus water not necessary for navigation; that it is not obliged to permit any of the water of the river and the pond to flow over the dam, but may withdraw the same through the canal extending from the pond to the slack water below the rapids, and draw and use the same from said canal wherever it may be available for water power, which judgment shall not conclude or prejudice the Green Bay and Mississippi Canal Company from recovering against the Kaukauna Water Power Company for the use of the water it may heretofore have drawn or shall hereafter draw from said pond.

Fifth. That the Kaukauna Water Power Company has no right to use and should be enjoined from using any water from the power which escapes over the dam that was erected and is maintained by the government so as to lessen or impair the proportionate flow, as hereinbefore determined, in said middle and north channels of all water which so escapes.

Sixth. The water power created by the government dam and as incidental thereto is the power produced by the surplus water not used for navigation flowing into the canal from the pond made by the dam intercepting the water of the river, of which water power and the surplus water created by the

improvement of the Green Bay and Mississippi Canal Company is the absolute owner.

Seventh. That plaintiff is not entitled to a judgment as demanded in the amended prayer of the complaint declaring and adjudging any portion of the entire natural flow of the waters of Fox river to be appurtenant to or as of right belonging to the north, south or middle channel of said river below the dam, excepting such water as is permitted to escape over the dam, subject to the right of the Green Bay and Mississippi Canal Company to use all the water power and all the surplus water of the river not required for navigation flowing from the pond created by the government dam into the canal, and the plaintiff ought not to have judgment against the Green Bay and Mississippi Canal Company which will abridge its right to the use of the water power and surplus water as it may deem necessary.

Eighth. The defendant, the Green Bay and Mississippi Canal Company, ought to have judgment for costs upon its answer, and the plaintiff is entitled to judgment for costs against such of the defendants as are affected by the relief which, by this decision, it is considered entitled to.

Let judgment be entered in accordance herewith.

R. N. AUSTIN,
Superior Judge.

Whereupon the following JUDGMENT was rendered:

[TITLE OF CAUSE.]

"Upon reading and filing the findings of fact and conclusions of law of the Hon. R. N. Austin, judge of said Court, and his order for judgment herein, and upon motion of B. J. Stevens and E. Mariner, attorneys for the defendant, the Green Bay and Mississippi Canal Company, it is hereby considered, adjudged and decreed that the defendant, the Green Bay and Mississippi Canal Company, is the owner of and entitled as against all of the parties to this action and their successors, heirs and assigns to the full flow of the river not necessary for navigation, from the said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or the pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used, wherever it may be available for water power, and return the same to the river where it shall see fit, and is not obliged to per-

mit any of the water from the river or pond to flow over said dam."

"Second. That all and singular the other parties to this action are hereby forever enjoined from interfering with said Green Bay and Mississippi Canal Company in so withdrawing and using such water."

"Third. It is further considered and adjudged, as in favor of the Patten Paper Company, against all the other defendants, that all of the water of the river *which is permitted by the Green Bay and Mississippi Canal Company to flow over the dam, or into the river above Island No. 4, so as to pass down the river, should be and is hereby divided and apportioned* between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns, and the Green Bay and Mississippi Canal Company and its successors and assigns, between and to the south, middle and north channels of the river in the following proportions, that is to say: 43-200 part of the water so permitted to flow down the river should flow down the south channel, 157-200 of the whole flow of the river so permitted to flow over the dam should of right flow down the main channel of the river, north of Island No. 4, and that of the water so permitted to flow down the main channel of the river, north of Island No. 4 and above the middle channel, 62-157 thereof should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel, north of Island No. 4 and above Island No. 3, 95-157 should of right flow down the north channel and north of Island No. 3, and each of the other parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so permitted to flow over the dam or into the river above Island No. 4, so as to prevent their flowing in said channels in the proportions aforesaid.

Fourth. Nothing in this judgment contained shall in anywise conclude the Green Bay and Mississippi Canal Company from recovering against the Kaukauna Water Power Company compensation for water which it has heretofore drawn or shall hereafter withdraw from the pond made by said upper dam, with the consent of said Green Bay and Mississippi Canal Company.

Fifth. That the Green Bay and Mississippi Canal Company do have and recover costs, etc.

Sixth. That the plaintiffs, the Patten Paper Company et al., do have and recover of and from the defendant, the Kaukauna Water Power Company, the sum of $249.44, as and for its costs and disbursements upon the issue made by the com-

plaint for the partition and division of the waters of said Fox river.

From which judgment the following appeals were taken:

[TITLE OF CAUSE.]

APPEALS.

"The PLAINTIFFS herein appeal from all of the judgment and decree rendered by the above Court herein, entered on the 19th day of January, 1894, in favor of the defendant, the Green Bay and Mississippi Canal Company, on *its cross-bill*, and against the said plaintiffs and all the defendants, being all and every part of said judgment, excepting only that part of said judgment adjudging that the plaintiffs recover of the defendant, the Kaukauna Water Power Company, their costs and disbursements herein, and also excepting that part of the third paragraph of said judgment specifying the proportions in which the water flowing in the Fox river should be permitted to flow in the various channels of said river; but they do appeal from that part of the third paragraph which limits the amount of water so apportioned to that part of "the water of the river which is permitted by the Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4, so as to pass down the river."

[TITLE OF CAUSE.]

"The above named defendants, KAUKAUNA WATER POWER COMPANY, Matthew J. Meade, Harriet S. Edwards, Milwaukee, Lake Shore and Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, B. Aymar Sands, Joseph Kline and Michael A. Hunt, appeal to the Supreme Court of the State of Wisconsin *from so much* of the judgment rendered by said Superior Court herein, on the 19th day of January, 1894, in favor of said defendant, the Green Bay and Mississippi Canal Company, and against all of the other parties to this action, *as is contained in the first, second and fourth subdivisions of said judgment*, and also from so much of the third subdivision of said judgment *as limits the division of water among the several channels in said river named in said third subdivision to so much of the water of said river as is or shall be permitted by said Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4*, so as to pass down the river; and said defendant, Kaukauna Water Power Company, appeals to said Supreme Court from that part of said judgment which is

embraced in the fifth subdivision thereof, and which adjudges that the Green Bay and Mississippi Canal Company do have and recover of the said Kaukauna Water Power Company and certain other parties to this action, the sum of $258.91, as and for its costs and disbursements upon the issue made by its answer and its cross-complaint in said action."

[TITLE OF CAUSE.]

"THE DEFENDANTS in the above entitled action, HENRY HEWITT, JR., and WILLIAM P. HEWITT, and who are also defendants in the cross-complaint of said Green Bay and Mississippi Canal Company filed in said action, appeal from all those parts of the judgment rendered on the 9th day of December, A. D. 1893, in and by the above named Court herein, and entered on the 19th day of January, A. D. 1894, in favor of the said Green Bay and Mississippi Canal Company and against the plaintiffs above named, the Kaukauna Water Power Company, Matthew J. Meade, Harriet S. Edwards, Henry Hewitt, Jr., William P. Hewitt, and others, in the following words:

"It is hereby considered, adjudged and decreed, that the defendant, the Green Bay and Mississippi Canal Company, is the owner of and entitled, as against all of the parties to this action, and their successors, heirs and assigns, to the full flow of the river not necessary for navigation from the said upper or government dam across the Fox river at Kaukauna, and it is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids, or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used wherever it may be available for water power, and return the same to the river where it shall see fit, and is not obliged to permit any of the water from the river or pond to flow over said dam."

"Second. It is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay and Mississippi Canal Company in so withdrawing and using such water."

"Fifth. That the Green Bay and Mississippi Canal Company do have and recover of and from the Patten Paper Company (Limited), the Union Pulp Company and the Fox River Pulp and Paper Company, plaintiffs, and the Kaukauna Water Power Company, Henry Hewitt, Jr., and William P. Hewitt, defendants, the sum of two hundred and fifty-eight and 90-100

dollars, as and for its costs and disbursements, upon the issue made by its answer and its cross-complaint herein."

And said defendants, Henry Hewitt, Jr., and William P. Hewitt, appeal from all parts of said judgment which limits, in favor of said Green Bay and Mississippi Canal Company, and as against said defendants, the amount of water apportioned between the three channels of said river to that which is permitted by the Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4 so as to pass down the river.

Yours, etc.,

DAVID S. ORDWAY,

Attorneys for Said Appellants, Henry Hewitt, Jr., and William P. Hewitt.

HEARING OF APPEALS.

Afterwards the said appeals were duly brought on before such Supreme Court to be heard, and were heard by said Court upon argument of counsel, and the said judgment so rendered aforesaid was by the judgment of said Court reversed upon each of said appeals, with costs against the said respondent, and it was further adjudged that said cause be and the same is hereby remanded to the Superior Court, WITH DIRECTIONS TO ENTER JUDGMENT IN ACCORDANCE WITH THE OPINION OF SAID COURT.

Whereupon the said case was remanded, in pursuance of said judgment to the Superior Court of Milwaukee County, and the said record having been so remitted to the Superior Court of Milwaukee County, the said plaintiffs by their attorneys and the defendant, the Kaukauna Water Power Company and its tenants, defendants in this action, by their attorneys, and the defendants, Henry Hewitt, Jr., and William P. Hewitt, by their attorney, on the 2d day of September, 1895, and the said Green Bay and Mississippi Canal Company and its tenants, defendants, by their counsel, came before the said Superior Court, and the said counsel for the Green Bay and Mississippi Canal Company and its tenants moved said Court for said company upon motion papers (page 561, transcript) for leave to amend their answer, by setting out their right as riparian proprietors to draw the water from the pond above the upper dam through the government canal, and that they had heretofore exercised that right, commencing in 1860, and that it was competent that it draw from the pond the one-half of the flow of said river and discharge the same through its canals as it had been accustomed to discharge it, and to turn into the south channel of said river the proportion of the flow adjudged to that channel, namely, 43-200 of the flow of the river, and into the middle channel the proportion of the flow of said river adjudged to it,

namely, 62-200 of the flow of said river (567), by appliances which had and might be constructed so as to permit the full share of the river appurtenant to the north channel of the river to be used by the plaintiff in error from the pond through the government canal without injury to the parties drawing and using water through the south and middle channels, which motion was denied, and thereupon the said Superior Court rendered judgment in said action as follows:

LAST JUDGMENT OF SUPERIOR COURT.

[TITLE OF CAUSE.]

A separate appeal having been taken to the Supreme Court of the State of Wisconsin by The Patten Paper Company (Limited), Union Pulp Company and Fox River Pulp and Paper Company, plaintiffs in said main action, a separate appeal also having been taken by The Kaukauna Water Power Company, Matthew J. Meade, Harriet S. Edwards, Milwaukee, Lake Shore and Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, B. Aymar Sands, Joseph Kline and Michael A. Hunt, defendants in said main suit, and a separate appeal also having been taken to the Supreme Court of the State of Wisconsin by the defendants in the main suit, Henry Hewitt, Jr., and William P. Hewitt, *all of said appeals being from the judgment rendered and entered herein on the issue joined upon the said cross-complaint of the Green Bay and Mississippi Canal Company* on the 19th day of January, 1894; and said judgment so entered in and by this Court on said 19th day of January, 1894, having been reversed upon each of said separate appeals by the judgment of said Supreme Court; and said Supreme Court having remitted to this Court the record and papers transmitted to said Supreme Court on said appeals, together with its decision, wherein, among other things, it decided and directed that this cause be and the same is hereby remanded to the said Superior Court with directions to enter judgment in accordance with the opinion of this Court.

And whereas, the judgments and remittiturs upon the three appeals were in the same language, except as to the amount of costs of the Supreme Court taxed therein.

First. Upon motion of Hooper & Hooper, plaintiff's attorneys, it is considered, adjudged and decreed, as in favor of the Patten Paper Company (limited), Union Pulp Company and Fox River Pulp and Paper Company against all of the defendants, that *all* of the water of the river, except that required for purposes of navigation *shall be and is hereby divided and apportioned between and to the south, middle and north channels of the river in the following proportions, that is to say:*

43-200 thereof of right should flow down the south channel, 157-200 thereof should of right flow down the main channel of the river, north of Island No. 4, and that of the water so of right flowing down the main channel of the river, north of Island No. 4 and above the middle channel, 62-157 thereof should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel, north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the north channel and north of Island No. 3, *and each of the parties to this action, their heirs, successors and assigns are forever enjoined from interfering with the waters of said river so as to prevent their flowing into* said channel in *the proportions aforesaid.*

Second. Upon motion of Messrs. Fish & Cary, attorneys for the said appellants, Kaukauna Water Power Company and others, and David S. Ordway, attorney for said appellants, Henry Hewitt, Jr., and William P. Hewitt, *it is considered and adjudged upon the issues joined by the cross-complaint of the defendant, Green Bay and Mississippi Canal Company, and the several answers made thereto by the other parties to this action, defendants in said cross-complaint, that the water power* which was created incidentally by the erection of said dam at Kaukauna, is due to the gravity of the water as it falls from the crest to the foot of the dam proper, across said river, and not to the use of the water of said river through said canal, and that neither said State of Wisconsin, nor said Green Bay and Mississippi Canal Company, as assignee of said state, ever acquired or owned any water power upon said river at Kaukauna, by reason of, or as incidental to, the construction and use of said canal for navigation.

Third. And it is further adjudged by the Court that said Green Bay and Mississippi Canal Company, its successors and assigns, shall so use *the water power, if at all, created by said dam, as that all the water used for water power or hydraulic purposes, shall be returned to the stream in such a manner, and at such place as not to deprive* the appellants, or those claiming under or through them of its use, as *it had been accustomed to flow past their banks, and that it shall flow past the lands of said appellants on said river, and in the several channels of said river below said dam, as it was accustomed to flow, and that said appellants have the right to use the water of said river, except such as is or may be necessary for navigation, as it was wont to run in a state of nature, without material alteration or diminution.*

Fourth. And it is further adjudged that the relief demanded in said cross-complaint be denied except as hereinbefore adjudged."

Fifth. And it is further adjudged that the appellants, Patten Paper Company, Limited, Union Pulp Company, and Fox

River Pulp and Paper Company have and recover of and from the Green Bay and Mississippi Canal Company, respondent in said cross-complaint, the sum of one hundred seventy dollars and seventy-three cents for their costs and disbursements upon the issue made by their answer to the cross-complaint herein aforesaid.

Sixth. And it is further adjudged that the defendants in said cross-complaint, Kaukauna Water Power Company, Matthew J. Meade, Harriet S. Edwards, Milwaukee, Lake Shore & Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, B. Aymar Sands, Joseph Kline, and Michael A. Hunt, have and recover of and from the Green Bay and Mississippi Canal Company, plaintiff in said cross-complaint, the sum of seven hundred and forty-five dollars and forty-seven cents ($745.47) for their costs and disbursements upon the issue made by their answer to the cross-complaint herein of said Green Bay and Mississippi Canal Company.

Seventh. And it is further adjudged that the said Henry Hewitt, Jr., and William P. Hewitt, defendants in said cross-complaint, have and recover of and from said Green Bay and Mississippi Canal Company, plaintiff in said cross-complaint, the sum of one hundred thirty-five dollars and forty-seven cents for their costs and disbursements upon the issue made by their answers to the cross-complaint herein of said Green Bay and Mississippi Canal Company.

By the Court,

R. N. AUSTIN,
Judge."

From this judgment the plaintiffs in error appealed to the Supreme Court of the state.

After said appeal had been perfected the defendants in error moved to dismiss the appeal "for the reason that said judgment, from parts of which said appeal was taken, was entered by said Superior Court of Milwaukee County, in accordance with and in execution of the mandate or remittiturs of said Supreme Court issued on three previous contemporaneous appeals and directed to said Superior Court, and is in fact and effect the judgment of said Supreme Court, and for the additional reason that no error is shown by the bill of exceptions settled upon the application of said Canal Company on or for said appeal.

That said motion will be based upon all the records, papers and proceedings on file in said Supreme Court." Which papers included all of the papers returned to this Court on this writ of error.

Upon the hearing of such motion the Supreme Court dismissed the appeal on the ground "that a judgment entered as this was (upon the mandate of the Supreme Court), in substantial accordance with the mandate of this Court, is in legal effect the judgment of this Court. It is just as effectually *res adjudicata* as where the judgment is affirmed."

ARGUMENT.

I have set out these pleadings and proceedings to this great length so that the Court may readily refer to them if my statements are questioned.

The theory of the original complaint and the answer is that the water power in this river belongs to the riparian owners and upon that theory the original complaint and the answers to the cross-complaint concede to the Canal Company the ownership of the north shore of the river from that pond to the down-stream line of the south or up-stream half of private claim one, the ownership of the canal on the north side for hydraulic purposes and the accustomed draft of the water appurtenant to the north bank of the river, through the canal, and the discharge of it below the head of Island No. 3, so that it would go into the north channel and not come into the middle channel. The Patten Paper Company sets this right out to sustain its action, and the Water Power Company and the Hewitts set it out as a defense against the cross-bill. That title and no other title to such water power is set out in those pleadings.

The theory of the plaintiff in error, the Canal Company, in its cross-complaint, is that the bed of this public river and the water flowing therein belonged to the United States and the State and the Canal Company, as their grantees, to the extent, at least, of the surplus water incidentally created by the work of improvement, in virtue of the right of the United States and the State in the bed of the stream and the creation of the water power by the Canal Company as the agent of the United States under the act of Congress of Aug. 8, 1846, and as the officer of the State which was doing this work under the Constitution of the State, Art. X, Sec. 8, which provides: "The State shall never contract any debt for works of internal improvement or be a party for carrying on such works, but whenever grants of land or other property shall have been made to the State, specially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works, and shall devote the avails of such grants and may pledge or appropriate the revenues derived from such works in aid of their completion." By the act of Aug. 8, 1848, the Legislature

in its first session especially enacted that the surplus power developed by this work of improvement should belong to the State, and agreeably to the decision of this Court in Barney vs. Keokuck, in which this Court say that the better rule is that the bed of the stream belongs to the sovereign, but that the States are at liberty to adopt such rule as they please.

The rights of the sovereign in this river bed would ordinarily have been settled at the time of and by the conveyance by the United States of the abutting lands as public lands while Wisconsin was a territory, when the better rule must have prevailed, or they must have been settled by the 15th and 16th sections of the act of 1848 above quoted. That title is set up and claimed to the water power in the cross-complaint to the extent that so long as the water remained in the pond and canal it was under the control of the Canal Company, which was entitled to its use, but when it was permitted to flow down into the river it became property of the riparian owners, and no farther.

The Superior Court in its first judgment of January, 1894, adopted the theory of the cross-complaint, in the language of Newman, J., record 549: "This claim the trial Court sustained to its full extent."

And from a part of this judgment, viz: so much of it as gave to the Canal Company all the water power created by the dam and work of improvement, and so much as limited the division of the water to the water which the Canal Company permitted to flow back into the river out of its control. The defendants in error took three separate appeals, which are substantially the same appeal. The important question in this case is: What jurisdiction did these appeals give to the Supreme Court over this case? Because if these appeals gave the Supreme Court full jurisdiction over the whole case, so that if they determined to deny the claim of the Canal Company to this water power, made by its cross-complaint, and reverse the judgment of the Superior Court, they could at the same time consider and determine what the relative rights of the parties in and to the water power as riparian owners were; but if these appeals gave jurisdiction to the Supreme Court only to consider the matters appealed from, viz: whether the Superior Court was right in determining that the Canal Company was entitled to this water power under its claim in the cross-complaint, then the Supreme Court had jurisdiction only to reverse that judgment and to remand the case to the Superior Court to consider, determine and adjudge the rights of the parties upon the original pleading and the answers thereto under the opinion of the Supreme Court.

The jurisdiction of the Supreme Court of the State of Wisconsin is derived from Sec. 2405 of the Revised Statutes of

Wisconsin, Sanborn & Berryman's Edition, which is in the words following:

"The Supreme Court shall have and exercise an appellate jurisdiction only, except when otherwise specially provided by law or the constitution, which shall extend to all matters of appeal, error or complaint from the decisions or judgments of any of the Circuit Courts, County Courts or other Courts of record, and shall extend to all questions of law which may arise in said Courts, upon a motion for a new trial, in arrest of judgment, or in cases reserved by said Courts."

So that in cases of this sort the Supreme Court has appellate jurisdiction only. Such jurisdiction is acquired only through the service of the notice of appeal provided by Sec. 3049 of the statute, which is in the words following:

"An appeal must be taken by serving a notice, in writing, signed by the appellant or his attorney, on the adverse party, and on the clerk of the Court in which the judgment or order appealed from is entered, *stating the appeal from the same* and *whether the appeal is from the whole or some part thereof;* and *if from a part only specifying the part appealed from.* The appeal shall be deemed taken by the service of the notice of appeal, and perfected on service of the undertaking for costs, or the deposit of money instead, or the waiver thereof, as hereinafter prescribed. When service of notice of appeal and undertaking can not, in any case, be made within this State, the Court may prescribe a mode of serving the same."

The power of the Supreme Court when an appeal has been taken is given by Sec. 3071 of the same statutes, so much of which as is essential to this argument is in the words following:

"Upon an appeal from a judgment or order or upon a writ of error, the Supreme Court may reverse, affirm or modify the judgment or order, and as to any or all of the parties, and may, if necessary or proper, order a new trial, *and if the appeal is from the part of a judgment or order may reverse, affirm or modify as to the part appealed from.* In all cases the Supreme Court shall remit its judgment or decision to the Court from which the appeal or writ of error was taken, to be enforced accordingly, and if from a judgment *final judgment shall thereupon be entered in the Court below, in accordance therewith*, except where otherwise ordered."

It will be seen by an examination of these sections:

First: That the jurisdiction of the Supreme Court in this case is appellate purely.

That its jurisdiction is derived from the service of the notice of appeal.

In Yates vs. Shepardson, 37 Wis., 315, the Court held that where a notice of appeal was served upon counsel and none

upon the clerk, but in place a stipulation was filed by the parties admitting service by each of notice on the other and waiving an undertaking, upon which the clerk of the lower Court remitted the record to the Supreme Court, that it did not thereby acquire jurisdiction, and dismissed an appeal on its own motion, after the case had been argued on its merits, and say:

"Cases can be brought by appeal to this Court only in the manner prescribed by the statute, which provides that a notice of appeal must be served on the adverse party and on the clerk of the Court. * * * Rule 3 requires the clerk to return the notice of appeal with the record to this Court. The plain object of this requirement is that the Court may see from the record that it has jurisdiction to review the judgment or order from which the appeal is taken."

Eureka Steam Heating Co. vs. Sloteman, 67 Wis., 118-125, in which the Court say:

"An appeal is not thus a mere gratuity or favor to be granted or withheld in the discretion of the trial Court, but an absolute right, if exercised within the time and in the manner prescribed by the statute. *The wording of the notice of appeal must be left to the party appealing.*"

So that the jurisdiction is confined to the matters specified in the notice of appeal.

Third: That this appeal being from a part of the judgment only, the Supreme Court did not get general jurisdiction of the whole case, but took jurisdiction of the part appealed from only; and that the general jurisdiction of the case, which includes in this case the right to consider and adjudicate the riparian rights according to the original complaint and the answers thereto and proofs to allow further pleadings or amendments and further proofs, agreeably to the suggestion of the Supreme Court and pertinent to the remaining issues as to riparian rights, which right of amendment in Wisconsin is coextensive with the jurisdiction of its Courts; that not having jurisdiction of the whole case, the Supreme Court could not consider issues raised by the original pleadings, which were not considered or determined by the Superior Court on the first trial, as it might if the appeal had been from the entire judgment, and could make no order respecting those matters not appealed from. Opinion of Cassody, C. J., on motion to dismiss appeal of plaintiff in eror from last judgment of Supreme Court, transcript 578, where he says:

"Those appeals were by three of the defendants in the cross-bill filed by the Canal Company from so much and such part of the judgment of the trial Court as sustained the paramount right of the Canal Company to all of the water power created by the government dam at Kaukauna, and the exclusive right

to use or authorize others to use the same wherever it might be available for water power, and to return the water to the river wherever it should see fit; but the balance of that judgment, relating, as it did, to the partition of the water power between the several riparian owners below the dam, had been entered by agreement and stipulation between such riparian owners, including the Canal Company, *and from those portions of the judgment there had been no appeal, and hence the same were never before this court for consideration.*"

The Judge is in error in stating that any part of the judgment was entered upon stipulation, but in other respects he is right. Therefore, so much of the judgment of the Supreme Court as directed the Superior Court to enter judgment in the case in accordance with the opinion of the Supreme Court, instead of directing the Superior Court to proceed further according to law and the opinion of the Supreme Court, was in excess of the jurisdiction of the Supreme Court. It took away from the Superior Court the power to consider and decide the issues made upon the original complaint and the answers thereto prevented any judgment thereon and confined that Court simply to the entry of a final judgment upon the mandate and in obedience to it.

Apparently the Supreme Court understood this contention. We undertook to demonstrate by our argument on the motion for a rehearing that the Supreme Court had not jurisdiction of the entire case, and that there was something left for the Superior Court to do in the case.

In answer to our argument the Court, in the opinion denying our motion for reargument, on page 549 of the record, say:

"But in the course of the litigation a new issue was introduced by the Green Bay and Mississippi Canal Company. *It claimed that by its purchase from the state of the canal and improvements and the water powers which were created by the improvements, it became the absolute owner of the water of the stream, with the right as against the owner of water powers on the rapids below the Kaukauna dam, to divert all the water of the stream, and use it wherever it best suited its interest, and to return it to the stream wherever it pleased, regardless upon its effect upon the water powers and rights of such lower owners. This claim the trial court sustained to its full extent.* It gave judgment sustaining it and enjoining all the other parties to the action from interfering with the complete exercise of the right so claimed from this part of the judgment these appeals were taken. *The right of this contention of the Green Bay and Mississippi Canal Company was the only question presented by these appeals.* This Court held that the Green Bay and Mississippi Canal Company owned all the water which was created by the construction and operation of the government dam at Kaukauna; that it had the right to use

all the water of the stream not used for purposes of navigation for the purpose of power, wherever it could or chose to use it, so far as it could do so without impairing the just rights of the owners of the water power upon the stream; that it was due to the other owners of water power below the dam that the water after being used by it should be returned to the stream at such place and in such manner as that it shall flow past the banks of such lower owners in its accustomed channels, and as it was accustomed aforetime to flow." * * * "But it is urged upon this motion that the language of the opinion is only general and will not enable the trial Court to determine and direct in what specific place or in what precise manner the water must be returned to the stream, nor how and where the respondent may lawfully use that relative proportion of the flow of the stream which is appurtenant to its bank below the dam. *Probably this is a just estimate of the opinion.* It has assumed to determine only the general principle by which the relative rights of the parties are to be determined, and had pronounced that general principle in general terms only. It could well do no more. The Court had no concrete question before it. *No such issue was made nor such judgment asked by the respondent's pleading; nor was any such issue adjudged by the trial court. Nor does the record furnish data by which such questions can be determined by this court. These are practical questions which can not be answered by the aid only of mere theory.* Probably it cannot be satisfactorily predicted in advance of experiment just where and how the water must be returned to the stream so as to work no injury to lower owners. *Certainly it cannot be determined by a court without evidence of some kind.*"

Upon this hint we undertook by additional pleading to supply the difficulty suggested by Justice Newman, that there was nothing before the Court upon which to find a judgment determining the rights of the parties as riparian proprietors, and so we moved before the trial Court when the record was returned to amend our pleadings, as shown at page 561 of the record.

As bearing upon this question, it is, perhaps, material to look into the opinion of the Supreme Court, on page 597, delivered upon the motion to dismiss our appeal from the second judgment rendered, in which we pressed upon the Court the language just quoted from the opinion of Justice Newman, to show that the Court had determined only the issue presented by the cross-complaint, and that if it had done more it had exceeded its jurisdiction, and that at least if a final judgment must be entered by the Superior Court upon that mandate without further consideration, that it should have been entered without prejudice as to the contentions made in the

original pleading, which had not been considered nor decided by the Superior Court nor by the Supreme Court.

The Court say:

"Certainly we did something more (on the former appeal) than determine that the Canal Company was not entitled to the whole water of the river, as contended by counsel; so it is very obvious that counsel is in error in claiming that the right of the Canal Company to draw water through the canal as riparian proprietor had not been considered by this Court. This Court had no power upon the former appeal and has no power now to leave open and undecided matters which were determined in the portions of the first judgment not appealed from. It would be an idle provision to insert in the judgment that the cross-bill was dismissed without prejudice as to the questions not determined by the trial Court or this Court in the judgment before us on the former appeal, and it would have been improper to insert therein that the judgment was without prejudice as to questions determined in the first judgment, and not appealed from or determined by this Court on such appeal. After careful consideration we are constrained to hold that the judgment entered is a substantial compliance with the mandate of this Court. Certainly it would have been improper to allow any amendment or pleadings or new litigation. The mandate was not for a new trial, nor for further proceedings according to law, 'but with directions to enter judgment in accordance with the opinion,' and it left nothing undetermined. This left nothing for the trial Court to do in the case except to enter judgment therein as directed."

HAS THE LAST JUDGMENT OF THE SUPREME COURT DEPRIVED THE CANAL COMPANY OF ITS PROPERTY?

Having demonstrated, as we think, that the Supreme Court of the State acquired jurisdiction to consider only, whether the water power created by this dam and work of improvement belonged to the Green Bay and Mississippi Canal Company, in virtue of its grant of power and property from the United States and the State, and the creation of the water power by the work of improvement and not to the riparian owners, and that it could only decide in that case whether the title of the Canal Company or the riparian owners was the better title to the water power, the question then arises: Does the last judgment of the Superior Court, page 554, take away from the Green Bay and Mississippi Canal Company any right of property, the title to which was not in issue and did not come under the jurisdiction of the Supreme Court of the State, and we think that it is apparent that it did.

The plaintiff in the original action conceded the title of the Green Bay and Mississippi Canal Company to the north bank of the river and the canal on that bank and its right to draw the water from the pond through that canal on the north bank of the river. It set out those rights and the further fact that the Canal Company was so drawing that water and discharging it below the head of Island No. 3, where it merely supplied the quantity of water due to the north channel, so that it could not come into the middle channel as lawful rights, in order to demonstrate that it was by reason of the unlawful draft of the water by the Kaukauna Water Power Company on the south side of the river in excess of its right to draw, that the Patten Paper Company was unable to get its due amount of water into the middle channel. The other defendants in error especially set out these rights of the Canal Company as a defense, to show that the acts of the Canal Company in drawing water from the pond through the canal were to be attributed to its rights as riparian proprietor, and not to its rights as grantee of the United States and the State, and as the constructor of the work of improvement.

This is pretty nearly conclusive evidence of the title of the Canal Company against the defendants in error, but the defendants in error did not stop there with the matter. They put in August Grignon and George W. Lawe and Alexander Grignon's deed to the State for right-of-way for the canal and dam, at page 342 of the record, and they put in Meade's deed to the Fox and Wisconsin Improvement Company, at page 382, and Mr. Lawe's deed to the Fox and Wisconsin Improvement Company, at page 384, both these last deeds conveying the property between a line drawn parallel to the canal and distant twenty feet northwardly therefrom down to the down-stream line of the south or up-stream half of Private Claim No. 1. This and the deed from the Canal Company to the United States, at page 58, we think establish the title of the Green Bay and Mississippi Canal Company to the water power appurtenant to the north bank of the river from the pond to the lower side of the upper half of Private Claim No. 1.

The remaining question is: Does the last judgment of the Superior Court, which the Supreme Court adopt as a compliance with its mandate, deprive the Canal Company of any of that property, and we think there can be no question but what it does.

The north end of the dam is down-stream a short distance from the south end of the dam, so that in order that the Green Bay and Mississippi Canal Company shall comply with the third clause of the judgment, it is essential that the water from the pond shall come into the stream, so as to flow by the land of

the Kaukauna Water Power Company as it was accustomed to flow, and in order to comply with the first clause of the judgment, to-wit:

"That all of the water of the river, except that required for purposes of navigation, shall be and is hereby divided and apportioned between the south, middle and north channels of the river, that is to say: 43-200 should flow down the south channel, 157-200 should of right flow down the main channel, * * * and each of the parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid."

The Kaukauna Water Power Company owns all the land on the south bank of the river, except the dam landing and the dam, and in order to comply with the third clause of the judgment, viz: that all the water used for water power or hydraulic purposes shall be returned to the stream in such a manner * * * that it shall flow past the lands of the said appellants (the Kaukauna Water Power Company and the Patten Paper Company and the Hewitts), as it was accustomed to flow * * * as it was wont to run in a state of nature, the water if used by the Canal Company must be turned into the river at the foot of the dam.

In order to accomplish that without artificial means, it is necessary, by reason of the rapid fall in the river, that the water be drawn into the river if it is drawn from the government dam in the pond at or near the foot of the dam. (Edwards' testimony, page ——.)

So that under either clause the Canal Company is forbidden to draw the water from the pond down through the canal to the mills, as it has been accustomed to draw it since the making of the Cord and Gray lease, introduced by the defendants in error, in 1860, which was on the site of the Kaukauna Paper Mills on Exhibit "A 1."

FEDERAL QUESTION.

The plaintiff in error charges as a federal question that it has been deprived of its property, to-wit: its right as owner of the water power on the Fox river created by the pond, as adjudged in 142 U. S., page 254, and as owner of the right to draw the surplus water of the river through the canal, on the north bank of the river, by reservation in its deed to the United States of Sept. 18, 1872, and as owner of the north bank of the river to draw one-half of the flow of the river from the pond created by the upper dam at Kaukauna, and carry the same down through the government canal and discharge it through

the mills of its tenants from the canal into the river below, by the foregoing proceedings, and particularly by the decision of the Supreme Court of the State upon the three appeals from the judgment and the order and mandate of said Court upon those appeals, which reversed the judgment of the Superior Court of Milwaukee County, and by the judgment of the Superior Court rendered on the 27th day of September, 1895, in obedience to the mandate of the Supreme Court, and by the order of the Supreme Court dismissing the appeal of the plaintiff in error from said judgment of the Superior Court, because it says that the said order of the Supreme Court remitting said clause to the Superior Court of Milwaukee County with direction to enter judgment thereon in accordance with the opinion of said Supreme Court, was in excess of its jurisdiction, and because the said judgment so rendered by the Superior Court was rendered solely in obedience to said mandate, without trial and without other authority than said mandate, and was entered without jurisdiction by said Superior Court to enter said judgment, and that the same is not due process of law.

Second. Because it says that the said order or mandate of the said Supreme Court to said Superior Court, and said judgment of said Superior Court in obedience thereto, was rendered in direct contradiction to the pleadings in the case, and thereby the aforesaid right of the plaintiff in error, which was conceded by all the pleadings in the case, to the above described property, was taken from the said plaintiff in error without due process of law.

We say, therefore, that the record shows that the property of the Green Bay and Mississippi Canal Company was taken from that company by the proceedings in this record without due process of law.

In the case of the Kaukauna Water Power Company vs. the Green Bay and Mississippi Canal Company, in error, 142 U. S., 254, Mr. Justice Brown delivered the opinion of the Court, from which I quote, as follows:

"Notwithstanding the inhibition of the constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the Court, it is evident that the Court could not have reached a conclusion adverse to the company, without holding either that none of its property had been taken or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This Court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record or in the opinion if an adjudication of such question would necessarily involve in the disposition of the case by the State Court."

If it appear from the record, as we have endeavored to show that it does, that the Supreme Court in reversing the case and remanding it to the Superior Court, with directions to enter judgment in accordance with the opinion, exercised full jurisdiction over the case, then it is plain that that Court exceeded its jurisdiction, and that the order was not due process of law, then a federal question arises under the above decision of Justice Brown, although no pleading raised the question whether if the Court rendered judgment in excess of its jurisdiction it would be contrary to the constitution of the United States. If the fact exists and appears by the record that the act of the Supreme Court and the act of the Superior Court in rendering this judgment were in excess of the jurisdiction of each Court, then it will appear by the record that the property of the Canal Company was taken without due process of law.

Judge Cassody, in respect to this mandate, on page 580, says:

"Certainly it would have been improper to allow any amendment to pleadings or new litigation. The mandate was not for a new trial nor for further proceedings according to law, but with directions to enter judgment in accordance with the opinion, and the opinion left nothing undetermined."

As was said by Mr. Justice Davis, in Furman vs. Nichols, 75 U. S., 57, in determining whether a federal question was stated in the record,

"All Courts take notice without pleading of the constitution of the United States and the public laws of the State where they are exercising their functions."

In what way could the pleader in Wisconsin at any time before the final order of the Supreme Court was made by the remittitur have raised this question by pleading, if it is not raised upon this record? The Supreme Court had jurisdiction to try the issue made upon the cross-complaint. That was given to the Court by the notice of appeal, which was perfected according to law, and by the same notice the jurisdiction of the Supreme Court was limited to that question. How could counsel anticipate that the Supreme Court would attempt to exceed its jurisdiction and render judgment taking away the property of the Canal Company, its title as riparian owner to which was conceded in the record, and had not been passed upon by the judgment of the Superior Court; and if he did anticipate it, how could he plead it? How could a pleader in Wisconsin, where facts alone can be pleaded, and not conclusions of law, nor evidence of facts, where the Court must take notice of the constitution and general laws of the United States and the constitution and laws of the State, plead or specially set up the 5th and 14th amendment? Not in bar of the action; not in abatement of the action. How could he set

up the right which was protected by the 5th and 14th amendments in the case at bar? If the Canal Company had pleaded in answer to the original complaint that the state of facts shown by this record, viz: that it was true it owned the bank of the river and the canal, and the accustomed right to draw the water as alleged in the complaint, but that it apprehended that the Superior Court might not find it necessary to consider its right in that behalf, and although it might be that the Court would adjudge that the company owned all the water of the river, according to its claim, yet that the plaintiff and the other defendants might appeal to the Supreme Court from a part of that judgment in such way as not to give the Supreme Court entire jurisdiction of the case, and that the Supreme Court might, as it says, inadvertently, overlook this riparian right and render judgment in excess of its jurisdiction, which should deprive the Canal Company of this conceded right, and therefore it plead the 5th and 14th amendments of the constitution and the immunities granted thereby, would that have been a pleading known to the law anywhere? What name should be given to it?

In Wisconsin our pleadings are limited by statute to complaint, demurrer, answer, counter-claim and probably cross-complaint. The complaint must state facts, not conclusions of law nor evidence of facts. The answer must answer the complaint and state new matter constituting a defense. The counter-claim must state a cause of action in favor of the defendant against the plaintiff arising out of or pertaining in some manner to the complaint, and the cross-complaint must conform to the law as to cross-bills.

Such a pleading as we have indicated would have been neither of these. It would have been a mere insolent impertinence, a slur on the Court, which would have been stricken out upon motion, with a reprimand.

Suppose that the pleader had generally set out he plead those two amendments to the constitution of the United States and stopped there, it would have been a mere impertinence to be stricken out upon motion; it would have had no reference to any contention of the parties as contained in the pleadings. Until after this case had been argued and decided, and the motion for reargument made and decided, the occasion for such pleading would not have arisen. It would not in any case be a pleading in the case to the merits of the action, but it would have been only a protest against a violation of the constitution by the Court, in advance of any probable emergency, and what is worse, it would probably, under the strict rule claimed in the briefs of the counsel, have been too late.

When that was done the mischief was done.

When the pleader in Wisconsin has set up his client's ownership of property, he has set up immunity of that property from judicial attack. The constitution follows in behind the pleading through the judicial notice which the Court must take, and sets up the exemption of that property in the Courts from the attack of the Court or the State without due process of law. There are no rights now in the United States not under the constitution, none not expressly protected by it from attack in judicial proceedings not due process of law, whatever there may have been in 1798. Every title to property, real and personal, that exists now in the United States, has been acquired under the constitution of the United States. As to every particle of it, those two amendments of the constitution give protection and immunity. Both the two amendments in terms give immunity to the citizen against the State and the Courts from being deprived of his property without due process of law, and to say that a judicial proceeding in a case like this, which appears by the record to take away the property of the suitor, without due process of law, is not amenable to review, because although the right of property is set up, the exemption contained in the constitution is not set up, is to emasculate to that extent the protection of the constitution and to expose, in the language of Justice Gray, in Scott vs. McNeal, 154 U. S., 45:

"The individual to the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice."

It is also apparent from this record that the right of the Green Bay and Mississippi Canal Company, which is conceded by the plaintiff in the original complaint, and admitted by the plaintiff in error in its answer thereto, by the Kaukauna Water Power Company and its tenants in their answer to the cross-bill, and by the defendants Hewitt in their several answers to the cross-bill, and fully established by the proofs, has been taken away from them by the judgment of this Court by judicial force. Certainly there are some limits to the power of the Court in taking away the property of the individual by their judgments, and it is equally certain, I think, that among those limits are the pleadings and proofs of the case. The act of the Court taking the property of the citizen by its judgment, which is opposed to the pleadings and to the proofs, is one of the mischiefs specially forbidden by the 14th amendment, one of the things the fear of which brought about the adoption of that amendment; and when it appears to have been done by the record, this Court can not stand by and see this provision of the amendment emasculated or annulled, by the saying that the act of Congress is insufficient; that this action of the Court,

which it was impossible to anticipate, has deprived the suitor of his properey, and we are powerless in the premises--we must sit by and see it done.

Under either view this motion must be denied.

E. MARINER,
Attorney for the Plaintiff in Error.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 190.

GREEN BAY & MISSISSIPPI CANAL COMPANY,
Plaintiff in Error,

vs.

PATTEN PAPER COMPANY (LIMITED), UNION PULP COMPANY, FOX RIVER PULP & PAPER COMPANY, KAUKAUNA WATER POWER COMPANY, MATTHEW J. MEADE, HARRIET S. EDWARDS, MICHAEL A. HUNT, ANNA HUNT, HENRY HEWITT, JR., AUG. L. SMITH, KAUKAUNA PAPER COMPANY, AMERICAN PULP COMPANY, W. P. HEWITT, ET AL.,
Defendants in Error.

Brief on Behalf of Green Bay & Mississippi Canal Company, Plaintiff in Error, on the Merits.

WRIT OF ERROR TO THE STATE COURT.

The history of the case and statement of facts, etc., given in the brief on motion to dismiss, somewhat extended and modified, are restated here, as such restatement is deemed to be convenient and desirable.

HISTORY OF THE CASE.

This suit was brought in the Wisconsin state court prior to the decision of the Kaukauna case so-called (Kaukauna Water Power Company, plaintiff in error, v. Green Bay & Mississippi Canal Company, defendant in error, 142 U. S. 254), and even prior to its decision in the state court (70 Wis. 635), although the conditions and circumstances under which it was brought in large part appear in the Kaukauna case, and with which presumably the court is familiar. At the place of controversy the Fox river is divided into three channels by two islands, and lower down the stream into four and five channels by two other islands, although only the division into three channels by Islands Nos. 4 and 3 (naming them in their down-stream order) is pertinent to the present controversy. At a short distance above the head of Island No. 4, a cross-dam had long been constructed, with an extension down stream, lying, the first part thereof, in the bed along the side of the north bank, and the latter part thereof along the edge of the bluff, and known as the Government Canal; while on and back of the south bank of the stream had just been constructed a canal exclusively for water-power, the South channel of the river being closed and used as a tail-race therefor. Both canals, the one on the north side and the one on the south side, took water from the pond above the cross-dam and on the same level therewith. The right to draw water from this pond into the canal on the south side was the question involved in the Kaukauna case, and which was decided adversely to the right claimed by the Kaukauna Water Power Company.

At the time suit was heard in the state court the Green Bay & Mississippi Canal Company, hereinafter called "Canal Company," was using for water-power nearly one-half of the flow of the river, taking it from the dam extension or government canal on the north side, passing it through the mills of its tenants, and discharging it at or below the head of Island No. 3, into the North channel, one of the three

channels in question. And at the same time the Kaukauna Water Power Company, hereinafter called "Water Power Company," was using nearly one-half of the flow of the river on the south side, taking it from the South side canal, passing it through the mills of its tenants, and discharging it below the head of Island No. 4, into the South channel, another of the three channels in question, and used as a tail-race. The water in both of the canals mentioned stood on the same level with the water in the pond above the cross-dam mentioned, while the water in the pond constructed in the Middle channel between Islands Nos. 4 and 3, and fully described in the pleadings, was at a level nearly or quite fifteen feet lower. From the higher level of the two canals the water or much of it was discharged into the channels of the river at points below the entrance to the Middle channel, and in such way that it could not flow into the Middle channel pond. On the theory that the owners of the Middle channel, as riparian owners, were entitled to have come into that channel all waters pertaining thereto, the suit was brought, and the prayer in substance was,—(1) to ascertain the share or proportion of the flow of Fox river where the same passes islands numbers 3 and 4, which in a state of nature did flow and now should be permitted to flow in the *South*, *Middle* and *North* channels of said river respectively; (2) to enjoin the *Kaukauna Water Power Company* and persons and corporations claiming under it from diverting the waters of said river appurtenant to the Middle channel from the *Middle* into the South channel of said river, confirming its then use of the water there to the one-sixth part of the flow pertaining to the South channel; and (3) for *costs* against said *Kaukauna Water Power Company.* (See prayer for judgment, Pr. Rec., pp. 34, 121 and 190.)

Map (Plff. Ex. A. 1) on file and small map hereto attached give the topography of the locality, showing the situation of the islands with relation to the banks of the river, the shape and direction of the channels, location of dams, mills, etc.

The pleadings charge the titles and ownership of the several parties to the suit, and show that three of them, the Patten Paper Company (Limited), Green Bay & Mississippi Canal Company and the Kaukauna Water Power Company, are interested as riparian owners in all three of the channels, and that the Hewitts are or were interested in two of them, the North and Middle channels. The other parties to the suit for the most part are lessees under and are represented by the parties last named, having interests kindred with theirs. The *complaint was filed by the Patten Paper Company (Limited) and two other parties for and in behalf of themselves and all others interested in the Middle channel, including the Green Bay & Mississippi Canal Company.* Those interested in the Middle channel not made plaintiffs and refusing to be made plaintiffs, namely, the Canal Company and several others, were made defendants pursuant to the statute of Wisconsin, as follows:

Wis. R. S. (2 S. & B. Ann. Stats.), sec. 2604: "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; * * *"

This reason for not making these parties plaintiffs is given in paragraph 16 of the complaint. (Pr. Rec., pp. 31 and 118.) *The suit is one by all of the parties interested in the Middle channel as plaintiffs against the parties interested in the South channel as defendants, although incidentally* the parties interested in the North channel were also made defendants because affected by a partition of the water, but the right of such parties interested in the North channel to use the waters as they were then using them, and all of the waters so used, not being questioned, prayer for judgment was not made against them. Or, stating it differently, the Patten Paper Company, representing the Middle channel, brought suit against the Kaukauna Water Power Company, representing the South channel, to enjoin a diversion of

water by the Kaukauna Water Power Company from the Middle channel, the bill alleging that water pertaining to the Middle channel was diverted by the Water Power Company into the South channel, although used from the South Side Canal as above stated, but that the water *pertaining to the North channel and no more* was being used by the Green Bay & Mississippi Canal Company from the government canal (paragraphs numbered 13, 14, 15 and 16 of complaint, Pr. Rec., pp. 26, 30 and 31, and also pp. 114 and 118), and hence not making as against such company prayer for relief of any kind,— the purpose of the suit *being not to determine the respective riparian interests and ownerships* of the respective parties, but confined to the ascertainment of the relative volumes of water which should flow in the respective channels, incidentally that is with a view solely to securing to the Middle channel owners for use at the pond in the Middle channel the share or proportion of flow of the river pertaining to that channel, and to enjoin the Kaukauna Water Power Company from diverting such share or proportion of water therefrom. To this complaint the Hewitts did not answer, being interested only in the *North and Middle channels*, and only four answers in all were served (viz., (1) Chicago & Northwestern Railway Company, (2) Reese Pulp Company; (3) Kaukauna Water Power Company and others, and (4) Green Bay & Mississippi Canal Company), of which those of the Chicago & Northwestern Railway Company (Pr. Rec., p. 138) and of the Reese Pulp Company (Pr. Rec., p. 143) did not raise issues of any kind. The joint answer of the Kaukauna Water Power Company, and certain others answering with them (Pr. Rec., p. 130), takes issue as to the relative volumes of water which should flow in the respective channels (fols. 177 and 183), charges at length the respective ownerships of the several parties so answering, and denies that the Kaukauna Water Power Company had taken into its canal and thereby diverted water from the Middle channel as charged in the complaint,

and alleges "*that they*" (it) "*have*" (has) "*a lawful right to take into and pass through said canal*" (below the pond of the plaintiffs) "*one half of the flow of said river*" (fol. 184). True, it refers to the Canal Company's canal on the north side of the river, and alleges that the same "is owned by the United States of America, and that the Green Bay & Mississippi Canal Company does not own the same so far as is necessary for the maintenance or use of the same for hydraulic power or otherwise" (Pr. Rec., p. 134, fol. 184), and makes a similar allegation respecting land claimed by the Canal Company (fol. 186); but it does not base a prayer thereon or set up a counter-claim of any kind and *makes no prayer for relief whatsoever.* The fourth and only other answer, the answer of the Green Bay & Mississippi Canal Company (Pr. Rec., p. 50, and Amended Answers, pp. 64, 84), *admits the allegations of the complaint substantially as made*, denies knowledge or information sufficient to form a belief as to some of the allegations, particularly those charging the respective riparian ownerships of the respective parties, asserts its right to continue its then use of the water, and pursuant to statute *sets up a cross-bill*, or counter-claim as in the Wisconsin statute called, asserting the company's right to divert and use the whole flow of the river, *that is, the balance of the flow not conceded* in the complaint, and prays judgment *that the apportionment be made* (as prayed), but subject to the company's prior right of use as follows (Pr. Rec., p. 101):

"*First*, any decree to be entered in this action, determining and adjudicating what share or proportion of the flow of said Fox river where the same passes Islands Nos. 3 and 4, in township 21 north, of range 18 east, is appurtenant, and of right should be permitted to flow in the South, Middle and North channels of said river respectively, shall declare and be made subject to the right of the defendant here answering to use all of the water-power created by the said government dam on its own lands on the north side of said river or elsewhere as it shall see fit; and that the apportionment of the flow of the river, so to be made, shall be con-

fined to such part of the river, if any, as shall not be so used and shall be permitted to flow in the channels of said river below said dam.

"And adjudging that this defendant may have such other judgment, order or relief in the premises as shall be just and equitable. And,

"*Second*, adjudging that the plaintiffs and the Kaukauna Water Power Company pay to this defendant here answering, its costs and disbursements incurred in this action."

Independently of the counter-claim or cross-bill, the only issue raised by all of the pleadings in the case had respect to the relative volumes of water flowing in the respective channels for the purpose aforesaid only, and the right to an injunction against the Water Power Company from diverting water from the Middle channel; and as to this issue the facts were stipulated (Pr. Rec., p. 492). So stipulated, they verify the allegations of the complaint, which allegations were (Pr. Rec., pp. 26, 114, 5th prgh.), namely: "*About five-sixths* of the flow of said river passed" * * * "through the channel north of Island Number 4, and *about one-sixth* through the channel south of said Island Number 4" (the *South channel so-called*); "*about one-third* of the flow of such river" * * * "passed through the channel between Islands Number 3 and 4" (*the Middle channel so-called*); "and *about one-half* of the flow of such river through the channel between Island Number 3 and the north shore of said river" (the *North channel so-called*); or, taking the flow of the river at say 200, and reducing these proportions to fractions of 200, there would be for the *South channel* 33⅓ 200, the *Middle channel* 66⅔-200, and the *North channel* 100-200. The stipulation admits (Pr. Rec., p. 492) that the proportions of the flow of the river were: in the *South channel* 43-200, in the *Middle channel* 62-200, and in the *North channel* 95-200; or, had the allegations of the complaint been definite and not as in fact they were approximate, the volumes admitted vary little therefrom. In the South channel there is admitted to be about 1-20 more, in the Middle channel about 1-50 less, and in the North

channel 1-40 less than the proportions alleged, but as made approximately and not definitely, there is entire agreement between the allegations made and the facts stipulated.

But the Canal Company by its answer interposing a counter-claim or *cross-bill* (Amended Answer II, III, etc., Pr. Rec., pp. 85–101) did therein in substance claim that, as the grantee of the state (the state acting as trustee for the United States) and of the Fox & Wisconsin Improvement Company, and by reason of having constructed the dam improvement and north side canal or dam extension, in question, under the acts of congress and of the state legislature pertaining thereto, it had acquired the ownership and right of use of the whole of the water-power created by the dam, and the works of improvement, including therein the canal or dam extension in questior ; and did claim that the ownership and right so asserted had in effect been confirmed to the company by the judgment of the Wisconsin supreme court in the case of Green Bay & Mississippi Canal Company against Kaukauna Water Power Company and others (70 Wis. 635), and since affirmed in this court (142 U. S. 254), and because thereof, and for relief, did pray, as aforesaid, that the apportionment of water as prayed for in the complaint be made, but as made be subject to the Canal Company's ownership and right of use as above stated; that is, that *apportionment be made of* the waste waters permitted to flow over the dam. (142 U. S., op. 282.) The Canal Company's claim of ownership of the half flow pertaining to the north bank of the river, or the flow of the North channel, so-called, being conceded and not in contention, the claim made to the whole water-power or flow of the river was an assertion of claim operative in the case only with respect to the half flow pertaining to the south bank, or the flow of the South and Middle channels, so-called, or as against the plaintiffs only the flow of the Middle channel. To this counter-claim or cross-bill, the defendants, other than those interested, as tenants or otherwise, under the Canal Company, made an-

swer, the Hewitts answering separately, and the plaintiffs made reply, all denying the claim of ownership and right so made by the Canal Company. The issues joined in the original action as aforesaid with the issues so joined on the counter-claim or cross-bill, coming on for trial, were together tried before the superior court of Milwaukee county, and after due consideration such court did file *in the original action* its "decision in writing," stating as required by statute (Wis. R. S., 2 S. & B., sec. 2863), separately, the facts found by the court and its conclusions of law, which, given at length in the record (Pr. Rec., pp. 191–194, and 519–522), omitting title, are as follows:

"*First.* The ownership of the lands bordering upon the rapids of the Fox river at Kaukauna was, at the time of the filing of the complaint, as alleged in the complaint.

"*Second.* The plaintiffs were, at the commencement of this action, and still are, the owners and lessees of mills situated on the Meade and Edwards power, on the Middle channel of the Fox river at Kaukauna, substantially as alleged, and which mills could not and cannot be run without water-power, and the use of which mills, with the water to which they are entitled, is of great value to the plaintiffs, as alleged, but the exact value is not found, the same being immaterial, because of the waiver of damages in this action.

"*Third.* By nature there flowed in the south channel of said river at said Kaukauna Rapids 43-200 of the whole flow of the river, and in the Middle channel 62-200 thereof, and in the North channel 95-200 thereof.

"*Fourth.* That at the commencement of this action the Kaukauna Water Power Company, by its servants, agents and lessees, diverted from the river above the head of Island No. 4, and so that the same could not pass into the Middle channel of the river, whereon plaintiffs' mills are situated, or north of Island No. 4, more than 43-200 of the flow of the river.

"*Fifth.* That the state of Wisconsin, under and by virtue of an act of the legislature of the state of Wisconsin, approved August 8, 1848, entered upon the improvement of the Fox and Wisconsin rivers and prosecuted such improvement up to some time in the year 1853, when the Fox & Wisconsin Rivers Improvement Company was incorporated and the work of improvement of those rivers turned over to that company.

"*Sixth.* That afterwards that company prosecuted the work of improvement and maintained the same as constructed by the state and by it, substantially as shown by the plaintiffs' exhibit 'A 1,' up to the time of the sale of the works of improvement to the trustees and the organization of the Green Bay & Mississippi Canal Company, when the same was turned over to that company, and that the Green Bay & Mississippi Canal Company completed said work of improvement and have since maintained the same, up to the 18th of September, 1872, when said company conveyed to the United States of America, by deed bearing date on that day, 'all and singular its (the said Green Bay & Mississippi Canal Company's) property and rights of property to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises, saving and excepting therefrom, and reserving to the said party of the first part, the following described property, rights and portions of franchises, which, in the opinion of the secretary of war and of congress, are not needed for public use, to-wit:' * * 'Second: Also (saving and reserving) all that part of the franchises of said company, namely, the water-powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same and those acquired in reference to the same.'

"*Seventh.* That the Fox & Wisconsin Improvement Company, so long as it had the control of said work of improvement, leased so much of the water-power created by said dam, to be drawn from the arm of the dam or canal, as it was able to lease for the best rents thereof it could obtain. That it became and was the absolute owner by grant from the state.

"*Eighth.* That since, down to the trial of this action, the Green Bay & Mississippi Canal Company has leased all of the water-power from the pond created by said dam and said canal or arm of the dam, to be used over the water-power lots abutting on said canal, and shown on the plaintiffs' exhibit 'A 1,' which it could find customers for, at the best rent it could obtain, and at the date of the trial it was leasing, to be used from said canal, more than 2,500 horse-power of water on the north side, and was permitting the defendant, the Kaukauna Water Power Company, to use more than 2,600 horse-power on the south side, and that the water-power thus controlled and leased by it passed to it by

purchase on foreclosure of mortgage, a trust deed given by the Improvement Company.

"*Ninth.* That the remainder of the flow of said river was permitted to spill over the dam and to pass down the river.

"*Tenth.* That the river below the dam is divided by islands into three channels, called respectively the South, Middle and North channels of the river.

"That 43–200 of the whole flow of the river below the dam passed in a state of nature through the South channel, and 62–200 of the whole flow passed through the Middle channel, and 95–200 of the whole flow of the river passed through the North channel.

"*And as conclusions of law*, I find that under the deed of September 18, 1872, the United States are bound to maintain the dam and canal so as to furnish to the Green Bay & Mississippi Canal Company all the surplus water from said pond not required for navigation, at such points on said canal as said Canal Company should desire to use the same.

"*Second.* That the maintaining of such dam and canal by the United States and supplying the water flowing therein to the Canal Company is in execution of such agreement, and that the Canal Company is entitled to use or lease to others all of the surplus water from said pond not necessary for navigation to be drawn through said canal or directly from said pond to be used for water-power, at such point or place on the canal or elsewhere as it shall see fit.

"*Third.* That the plaintiffs are entitled to judgment, that of the water permitted by the United States and the Green Bay & Mississippi Canal Company to flow in said river below the dam and above the head of Island No. 4, 43–200 thereof should of right flow down the South channel, and 157–200 thereof down the Main channel north of Island No. 4, and that of the water so permitted to flow down the Main channel north of Island No. 4 and above the Middle channel, 62–157 thereof should of right flow down the Middle channel and south of Island No. 3, and 95–157 thereof down the North channel, or north of Island No. 3.

"*Fourth.* That the Green Bay & Mississippi Canal Company is entitled to have and recover judgment against all the other parties in the action, that it is entitled to all the surplus water not necessary for navigation, that it is not obliged to permit any of the water of the river and the pond to flow over the dam, but may withdraw the same through the canal, extending from the pond to the slack water below the rapids, and draw and use the same from said canal wherever it may be available for water-power,

which judgment shall not conclude or prejudice the Green Bay & Mississippi Canal Company from recovering against the Kaukauna Water Power Company for the use of the water it may heretofore have drawn or shall hereafter draw from said pond.

"*Fifth.* That the Kaukauna Water Power Company has no right to use, and should be enjoined from using, any water from the power which escapes over the dam that was erected and is maintained by the government, so as to lessen or impair the proportionate flow as hereinbefore determined in said Middle and North channels, of all water which so escapes.

"*Sixth.* The water-power created by the government dam and as incidental thereto is the power produced by the surplus water not used for navigation, flowing into the canal from the pond made by the dam intercepting the water of the river; of which water-power and the surplus water created by the improvement, the Green Bay & Mississippi Canal Company is the absolute owner.

"*Seventh.* That plaintiff is not entitled to a judgment as demanded in the amended prayer of the complaint, declaring and adjudging any portion of the entire natural flow of the waters of Fox river to be appurtenant to or as of right belonging to the North, South or Middle channel of said river below the dam, excepting such water as is permitted to escape over the dam, subject to the right of the Green Bay & Mississippi Canal Company to use all the water-power, and all the surplus water of the river not required for navigation, flowing from the pond created by the government dam into the canal; and the plaintiff ought not to have judgment against the Green Bay & Mississippi Canal Company which will abridge its right to the use of the water-power and surplus water as it may deem necessary.

"*Eighth.* The defendant, the Green Bay & Mississippi Canal Company, ought to have judgment for costs upon its answer, and the plaintiff is entitled to judgment for costs against such of the defendants as are affected by the relief which by this decision it is considered entitled to.

"Let judgment be entered in accordance herewith."

And upon which "decision in writing" judgment in the original cause was duly entered (Pr. Rec., pp. 194–196), which judgment, entered January 19, 1894, omitting title, is as follows:

"Upon reading and filing the findings of fact and conclusions of law of the Honorable R. N. Austin, judge of said

court, and his order for judgment herein, and upon motion of B. J. Stevens and E. Mariner, attorneys for the defendant, the Green Bay & Mississippi Canal Company,

"It is hereby considered, adjudged and decreed that the defendant, the Green Bay & Mississippi Canal Company, is the owner of and entitled, as against all of the parties to this action and their successors, heirs and assigns, to the full flow of the river not necessary for navigation from the said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used, wherever it may be available for water-power, and is not obliged to permit any of the water from the river or pond to flow over said dam.

"And, *second.* It is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay & Mississippi Canal Company in so withdrawing and using such water.

"*Third.* It is further considered, adjudged and decreed, as in favor of the Patten Paper Company, against all the other defendants, that all the water of the river which is permitted by the Green Bay & Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4, so as to pass down the river, should be, and it is hereby, divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns, and the Green Bay & Mississippi Canal Company and its successors and assigns, between and to the South, Middle and North channels of the river in the following proportions — that is to say: 43-200 part of the water so permitted to flow down the river of right should flow down the South channel; 157-200 of the whole flow of the river so permitted to flow over the dam should of right flow down the main channel of the river, north of Island No. 4, and that of the water so permitted to flow down the main channel of the river, north of Island No. 4 and above the Middle channel, 62-200 thereof should of right flow down the Middle channel and south of Island No. 3, and that of the water flowing down the North channel, north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the North channel and north

of Island No. 3; and each of the other parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so permitted to flow over the dam or into the river above Island No. 4 so as to prevent their flowing into said channels in the proportions aforesaid.

"*Fourth.* Nothing in this judgment contained shall in anywise conclude the Green Bay & Mississippi Canal Company from recovering against the Kaukauna Water Power Company compensation for water which it has heretofore drawn or shall hereafter withdraw from the pond created by said upper dam with the assent of the Green Bay & Mississippi Canal Company.

"*Fifth.* That the Green Bay & Mississippi Canal Company do have and recover of and from the Patten Paper Company (Limited), The Union Pulp Company, and The Fox River Pulp & Paper Company, plaintiffs, and the Kaukauna Water Power Company, Henry Hewitt, Jr., and Wm. P. Hewitt, defendants, the sum of two hundred and fifty-eight and $\frac{99}{100}$ dollars as and for its costs and disbursements upon the issue made by its answer and its cross-complaint herein.

"*Sixth.* That the plaintiffs, The Patten Paper Company (Limited), The Union Pulp Company, and The Fox River Pulp & Paper Company, defendant, have and recover of and from the defendants The Kaukauna Water Power Company the sum of two hundred forty-nine and $\frac{44}{100}$ dollars as and for its costs and disbursements upon the issue made by the complaint for the partition and division of the waters of the Fox river."

From parts of this judgment three separate appeals to the supreme court were taken respectively by the plaintiffs in the original action, the Kaukauna Water Power Company and the Hewitts, and the parts of the judgment so appealed from in all of these appeals were in terms (Pr. Rec., pp. 532, 533, 535 and 536) *restricted to the parts given in favor of the Canal Company*, and to parts awarding costs resulting therefrom, and the appeals operated to vest in the supreme court jurisdiction only of the *issues raised by the* counterclaim. Says Newman, J.: "The right of this contention of the Green Bay & Mississippi Canal Company was the only question presented by these appeals." (Op. Newman, J., Pr. Rec., p. 549, line 34, and p. 586, line 24; also, recital

in judgment entered thereon, p. 554, and see p. 568.) And says Cassoday, C. J. (after referring to the effect of the judgment of January 19, 1894, Pr. Rec., p. 578, lines 21 to 35) "from those portions of the judgment there had been no appeal, and hence the same were never before this court for consideration."

Having in such case appellate jurisdiction only, the court's jurisdiction herein is restricted to that which is conferred by the notice of appeal (Wis. R. S., 2 S. & B., secs. 2405, 3049 and 3071).

Upon the hearing of these appeals, the supreme court reversed the judgment and remanded the cause with directions to enter judgment "in accordance with the opinion of this ('supreme') court." (Judgment of reversal, Pr. Rec., pp. 539, 540; op., pp. 540–546; notice of rehearing, p. 547; rehearing denied and opinion, p. 550; cause remanded, pp. 551, 552, 553.)

Upon the return of the record, the superior court of Milwaukee county, pursuant to the mandate of the supreme court, rendered its judgment (Pr. Rec., pp. 554–556) entitled ui both the *original and cross causes.* This judgment, dated September 27, 1895, omitting the title and paragraphs 5, 6 and 7, of minor importance, is as follows, to wit:

"A separate appeal having been taken to the supreme court of the state of Wisconsin by The Patten Paper Company, Limited, Union Pulp Company, and Fox River Pulp and Paper Company, plaintiffs in said main action, a separate appeal also having been taken by the Kaukauna Water Power Company, Mathew J. Meade, Harriet S. Edwards, Milwaukee, Lake Shore & Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, B. Aymar Sands, Joseph Kline and Michael A. Hunt, defendants in said main suit, and a separate appeal also having been taken to the supreme court of the state of Wisconsin by the defendants in the main suit, Henry Hewitt, Jr., and William P. Hewitt, all of said appeals being from *the judgment rendered and entered herein on the issue joined upon the said cross-complaint* of the Green Bay & Mississippi Canal Company on the 19th day of January, 1894; and said judgment so entered in and by

this court on said 19th day of January, 1894, having been reversed upon each of said separate appeals by the judgment of said supreme court; and said supreme court having remitted to this court the record and papers transmitted to said supreme court on said appeals, together with its decision, wherein, among other things, it decided and directed that this cause be, and the same is hereby, remanded to the said superior court with directions to enter judgment in accordance with the opinion of this court."

"And whereas, the judgments and *remittiturs* upon the other two appeals were in the same language, except as to the amount of costs of the supreme court taxed therein:

"*First:* Upon motion of Hooper & Hooper, plaintiff's attorneys, it is considered, adjudged and decreed, as in favor of the Patten Paper Company (Limited), Union Pulp Company, and Fox River Pulp and Paper Company against all the defendants, that all of the water of the river except that required for the purposes of navigation shall be, and is hereby, divided and apportioned between and to the South, Middle and North channels of the river in the following proportions — that is to say, 43-200 thereof of right should flow down the South channel, 157-200 thereof should of right flow down the Main channel of the river north of Island No. 4, and that of the water so of right flowing down the main channel of the river north of Island No. 4, and above the Middle channel, 62-157 thereof should of right flow down the Middle channel and south of Island No. 3, and that of the water flowing down the North channel north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the North channel and north of Island No. 3; and each of the parties to this action, their heirs, successors and assigns, *are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid.*

"*Second:* Upon motion of Mess. Fish & Cary, attorneys for the said appellants, Kaukauna Water Power Company and others, and David S. Ordway, attorney for said appellants, Henry Hewitt, Jr., and William P. Hewitt, it is considered and adjudged, upon the issue joined by the cross-complaint of the defendant Green Bay & Mississippi Canal Company, and the several answers made thereto by the other parties to this action, defendants in said cross-complaint, that the water-power which was created *incidentally* by the erection of said dam at Kaukauna *is due to the gravity of the water as it falls from the crest to the foot of the dam* proper across said river, and *not to the use of the water of said river through said canal,* and that neither said state

of Wisconsin nor said Green Bay & Mississippi Canal Company, as assignee of said state, ever acquired or owned any water-power upon said river at Kaukauna by reason of or as incidental to the construction and use of said canal for navigation.

"*Third:* And it is further adjudged by the court that said Green Bay & Mississippi Canal Company, its successors and assigns, shall so use the water-power, if at all, created by said dam as that all the water used for water-power or hydraulic purposes shall be returned to the stream in such a manner and at such place as not to deprive the appellants or those claiming under or through them of its use as it had been accustomed to flow past their banks, and that it shall flow past the lands of said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants have the right to use the water of said river except such as is or may be necessary for navigation as it was wont to run in a state of nature without material alteration or diminution.

"*Fourth:* And it is further adjudged that the relief demanded in said cross-complaint be denied except as hereinbefore adjudged."

From this judgment of the superior court the Canal Company appealed to the supreme court, *the contention* being that the issue in the original cause had not been tried, and that the judgment was not supported by, but was against, both pleadings and proofs, and that an amendment to the Canal Company's cross-bill should have been allowed and the case considered upon its merits. (Pr. Rec., pp. 560–569; notice of appeal, p. 571.)

Thereupon, on motion made to the supreme court in behalf of the plaintiffs (below), the Kaukauna Water Power Company et al. and the Hewitts (Pr. Rec., pp. 576, 577), the appeal so taken was dismissed. (Judgment of dismissal, Pr. Rec., p. 578, op. p. 578.)

And thereupon, while the record of the cause still remained in the supreme court, motion on behalf of the Canal Company was made to said court to set aside said order and reinstate the said appeal. (Motion, Pr. Rec., p. 591, and grounds therefor, pp. 582–591.) Which motion, entertained and considered by the court (Pr. Rec., p. 592), was by its

order and judgment denied, and opinion thereon filed May 6, 1896. (Op. Pr. Rec., pp. 593, 594.) Thereupon, on such determination, the said superior court judgment so entered pursuant to the mandate of the supreme court, became the judgment of the supreme court.

(Cassoday, C. J.: "We are clearly of the opinion that a judgment entered, as this was, in substantial accordance with the mandate of this court, is in legal effect the judgment of this court." Pr. Rec., p. 580, line 21. See, also, Atherton v. Fowler et al., 91 U. S., p. 143.)

And thereupon, *while the record of said cause still remained in said supreme court, writ of error to that court was sued out from this court.*

The following is an excerpt from the opinion of the supreme court filed on the motion to reinstate appeal:

Cassoday, C. J.: * * * (Pr. Rec., p. 593, line 41.) "*Counsel for the appellant seems to be correct in claiming that in deciding the motion to dismiss the appeal we overlooked the fact that the complaint* for the partition of the water in the river below the dam and above the head of the islands mentioned admitted that the Canal Company was then drawing one-half the flow of the river from the dam in and through its canal to a point below the head of Island No. 3, and there used or leased to others to be used as water-power while passing from the canal down into one or more of the channels below the dam, and that the prayer of the complaint asked no restraint of such drawing and use by the Canal Company, but simply asked an injunction against the Kaukauna Water Power Company, and that the court should determine and adjudge what share or proportion of the entire natural flow of the river was appurtenant to and of right should be permitted to flow in the South, Middle, and North channels of the river, respectively. The purpose of the action was not to contest conflicting claims to water above the dam nor such as flowed in the canal, but to partition the water which might flow in the river below the dam between the several owners thereof, as prescribed by the statutes. Ch. 203, Laws 1881, secs. 3149–3152, S. & B. A. S. See, also, secs. 3101–3148, id. The Canal Company, being a riparian owner on islands numbered three and four mentioned, was a proper and necessary party to such partition suit. Id. As such defendant it filed its cross-bill therein, and thereby claimed not only the paramount right

to all the water in the river for the purposes of navigation and the surplus water-power incidental to the improvement, but also claimed the right to draw all such surplus water through the canal to any point below where it might desire, and there to use the same or lease the same to others to be used as water-power. The other parties to the action conceding that the Canal Company had such paramount right for the purposes of navigation and the paramount right to all the surplus water-power incidental to the improvement to be used at the dam or so near the dam as not to impair their just rights as riparian owners on the islands below the dam, yet denied the right of the Canal Company to use the canal as a mere head-race to convey such surplus water to a point below or opposite the islands mentioned, and there create a water-power by emptying the same into the river. The determination of the issues thus joined made it the duty of the trial court and of this court to determine where or about where such surplus water-power as was merely incidental to the construction of the dam might be used or returned to the river below the dam. With the determination so made we are entirely satisfied. S. C., 90 Wis. 370; S. C., 61 N. W. Rep. 1121; S. C., 63 N. W. Rep. 1019; S. C., 66 N. W. Rep. 601. The Canal Company obtained its right to such surplus water-power merely because it was and is incidental to the improvement. Green Bay & Mississippi Canal Co. v. Kaukauna Water Power Co., 70 Wis. 635; S. C. affirmed on writ of error, 142 U. S. 254. See, also, Attorney-General v. Eau Claire, 37 Wis. 400; S. C., 40 Wis. 533; Bell v. City of Platteville, 71 Wis. 139. To hold as contended by the Canal Company would, to a certain extent at least, make the right of navigation incidental to the creation of the water-power instead of the water-power being incidental to the improvement of the river for navigation. For the reasons given, the motion to vacate the order dismissing the appeal and to reinstate the same is denied, with $10 costs and clerk's fees."

By this judgment of the superior court, thus become the judgment of the supreme court, there is taken from the Canal Company and its tenants the right to draw water from the dam extension or government canal, so called, through the mills of its tenants, and discharging the same into the North channel near and *below the mouth of the Middle channel*, at the places and only places where the Canal Company and its lessees have heretofore drawn and used water,

and the only places where the water can be drawn and used advantageously by the company, and to its damage running into the hundreds of thousands of dollars. On the motion to reinstate the appeal (Pr. Rec., p. 589, pp. 582–589) it was charged that the effect of this judgment was to adjudge as follows:

(*a*) "That the Canal Company must return to the stream the whole water of the river far enough above the head of Island No. 4 to enable forty-three two-hundredths thereof to flow in the South channel, and one hundred and fifty-seven two-hundredths thereof to flow in the North channel, north of Island No. 4, thereby preventing appellant from using the half of the water appurtenant to the North channel, where it was using the same when the suit was commenced, and while its right to there use the same was admitted by the pleadings and adjudged by the trial court.

(*b*) "While this court holds that the place where the appellant may use the water of the pond 'is restricted only by its duty to refrain from injuring others,' nevertheless, in disregard thereof, the judgment requires the whole water of the river to go to the head of Island No. 4, and one hundred and fifty-seven two-hundredths of it to pass through the channel on the north side of Island No. 4, although the fact was and is that the appellant was able to draw that portion of the water appurtenant to the north bank of the river from the pond through the canal, and there use it without injury to the respondents; and by reason whereof the appellant is excluded from its accustomed use of water-power appurtenant to the north half of the river, a use in the pleadings conceded by the Patten Paper Company, and alleged as a fact by the Kaukauna Paper Company.

(*c*) "While this court holds that it 'has assumed to determine only the general principle by which the relative rights of the parties are to be determined, and pronounced that general principle in general terms only, and that no issue was made or any judgment asked by the respondent's pleadings, nor adjudged by the trial court, as to how and where the appellant might lawfully use that relative proportion of the flow of the stream which is appurtenant to its bank below the dam; and that the record did not furnish data by which such questions can be determined by the court; and that those questions could not be determined by the court without appeal of some kind; that those are practical questions which cannot be answered by the aid only of mere theory. Probably it cannot be satisfactorily predicted

in advance of experiment just where and how the water must be returned to the stream, so as to work no injury to lower owners; and, certainly, it cannot be determined by the court without evidence of some kind.'

"Yet the judgment, after denying the Canal Company's claim, which this court held was the only issue in the case, proceeds to determine in specific terms the rights of the parties, including the Canal Company, which had not been put in issue in the pleadings, viz.: That the Canal Company, owning the pond, and owning the riparian right on the north bank of the river, was not at liberty to use those two rights in conjunction one with the other, but must use them (if at all) separately, by determining in effect that the whole flow of the channel must go into the stream below the dam, and above the head of Island No. 4, and there be divided; and

(*d*) "While this court determined that the record did not furnish data by which the questions how and where the appellant might lawfully use the relative proportion of the flow of the stream which was appurtenant to its banks below the dam, and that these questions could not be determined by the court without evidence of some kind, yet the court below refused to allow the pleadings to be amended so as to put these questions at issue as a foundation for evidence upon which these could be determined, and yet further, the judgment itself appears to determine these very questions so specifically that it, to use the language of the chief justice, 'seems to be as definite and certain as language can make it without fixing the limit by survey and metes and bounds.'"

The claims of ownership or title in the Canal Company shown by the pleadings and proofs in the cause, the validity of which will be considered later, and *which are defeated by this judgment*, are four in number, and are as follows:

"*First claim.*— A claim as riparian owner. It appears that the company is the owner of the north bank of the river from and including the cross-dam down to the seven-acre tract, and is the owner of the undivided half of the seven-acre tract, which tract extends to a point quite a distance below the first lock. It is also the owner of undivided interests in the shores of islands Nos. 4 and 3 on the south side of the North channel, and in the shores of one or more of the other islands, thus giving to the company as riparian owner on the north side, the whole power of the north half of the river above island No. 4, and the greater part, but not

the whole, of the power appurtenant to the North channel below the heads of islands Nos. 4 and 3. *This claim of ownership, therefore, is restricted to something less than the flow of the North channel, and hence less than the half flow of the river appurtenant to the north bank.*

"*Second claim.*— A claim as absolute owner of all of the water-power down to the first lock created by the *canal improvement*, so called. The fall in the stream from the foot of the cross-dam down to the seven-acre tract is five and one-half feet, and along the seven-acre tract to a point opposite the upper lock is six feet, in all eleven and one-half feet, to which is to be added the fall at the dam. This claim to power *down as far as the lock* is precisely the same in kind as the company's title to the power at the dam, held by this court to be in the Canal Company, and extends to one-half the flow of the river, being a trifle more than *the flow appurtenant to the North channel, and is a claim of title additional to and overlapping claim No. 1.*

"*Third claim.*— A claim of right of use at the canal embankment, regarding the same as an *extension of the dam, of all of the power created by the dam*, including the canal, namely, *the whole flow of the river*, and based upon or supported by the Kaukauna cases, state and federal. Under this claim (so far as so supported), the power can be used only 'at the dam,' and hence at any point from lot 5 on the south side of the river to the upper lock on the north side of the river, the structure for the whole distance constituting the dam. But it is the power of the entire flow of the river, and so far as relates to the half flow of the river appurtenant to its north bank (chiefly the North channel), the claim is additional to and overlaps claims Nos. 1 and 2, while it is *a new and entirely independent claim to the half flow of the river appurtenant to the south bank.*

"*Fourth claim.*— A claim based upon the appropriation by the state (vicariously for the United States) of all of the water-power of the river to be used anywhere on the company's lands or any lands it may acquire therefor at the dam, below the dam, below the lock, or anywhereon the river, the appropriation being of all of the powers created by the dams or other works of improvement. Like claim No. 3, this extends to the whole flow of the river, is a new claim as to the half flow appurtenant to the south bank, and as to the half flow appurtenant to the north bank is additional to and overlaps claims Nos. 1 and 2; but unlike claim No. 3, it is not restricted with respect to use of water-power at the dam, even though extended to the upper lock, but admits of use at the dam and elsewhere. It is apparent

that the four claims differ each from each of the others. Two of these, Nos. 1 and 2, entitled the company to use, where it is now using, substantially one-half of the flow of the river, one permitting the use of a trifle more of the flow than the other. The remaining two, Nos. 3 and 4, entitled the company to use of the entire flow of the river, one where it is now using the water, that is, on the dam extended, and the other anywhere on the river wheresoever the company acquires lands.

The question of the validity of only one (No. 4), possibly two (Nos. 4 and 3), of these claims was by the pleadings presented to the state court, and *this only with respect to the half flow of the river appurtenant to the south bank.* The question of the right of use by the Canal Company of the half flow *of the river appurtenant to the north bank* was not presented to the court because not raised by the issues.

These valuable property rights are taken from the company by the judgment of the supreme court in a cause in which it was without jurisdiction of the adjudged matters affecting the Canal Company, and were so taken without due process of law and in violation of the fourteenth amendment to the constitution of the United States.

STATEMENT OF FACTS.

NOTE.— The statutes and documents, or excerpts therefrom, referred to herein are given in the APPENDIX, *hereto attached.*

The Fox and Wisconsin rivers are public navigable waters of the United States of the class covered by the ordinance of 1787,[1] section 13 of which declares as follows:

"It is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as *articles of compact* between the original states and the people and states in the said territory, *and forever remain unalterable, unless by common consent,* to wit: * * * Art. IV. * * * The navigable waters leading into the Mississippi and St. Lawrence *and the carrying places between the same* shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor."

This dedication to public uses was re-asserted, and the provision itself re-enacted, in the act providing for the ter-

[1] Wis. R. S., 1858 ed., p. 1065, sec. 13, art. IV.

ritorial government of Wisconsin, approved April 20, 1836,[1] in the enabling act providing for the admission of Wisconsin into the Union, approved August 6, 1846,[2] in the constitution of Wisconsin[3] when admitted by act approved May 29, 1848,[4] and in the acts of the legislature subsequently passed[5] relating thereto and to navigable waters.

These waters, thus unalterably dedicated as public highways, are by the federal and state courts held to be public waters of the United States over which its jurisdiction and control, as distinguished from the jurisdiction and control of the several states, extends, and to which all federal laws relating to public waters apply.

It was to these waters, the Fox river, that this court, speaking by Davis, J., in "The Montello" (pp. 439-440), say:

"The Fox river has its source near Portage City, Wisconsin, and flows in a northeasterly direction, through Lake Winnebago into Green Bay, and thence into Lake Michigan, and by means of a short canal of a mile and a half it is connected at Portage City with the Wisconsin river, which empties into the Mississippi." * * * "It is true, without the improvements by locks, canals and dams, Fox river, through its entire length, could not be navigated by steamboats or sail vessels, but it is equally true that it formed, in connection with the Wisconsin, one of the earliest and most important channels of communication between the Upper Mississippi and the lakes."

"It was this route which Marquette and Joliet took in 1673 on their voyage to discover the Mississippi; and the immense fur trade of the northwest was carried over it for more than a century. Smith, in his History of Wisconsin, says: 'At this time (1718) the three great avenues from the St. Lawrence to the Mississippi were, one by the way of the Fox and Wisconsin rivers, one by way of Chicago, and one by the way of the Miami of the lakes, when, after crossing the portage of three leagues over the summit level, a shallow stream led into the Wabash and Ohio.' *It is therefore apparent that it was one of the highways referred to in the ordinance of 1787, and, indeed, among the most favored on account of the short portage between the two rivers,*"[6] and also so held as respects the Wisconsin river.[7]

In recognition of the United States' control of these waters, congress made by act approved August 8, 1846, a grant of lands to the then territory of Wisconsin in trust to aid in improving the navigation thereof. * * *

"The said rivers when improved and the said canal" (connecting the rivers) "when finished *shall be and forever remain* a public *highway for the*

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[1] Wis. R. S., 1858, p. 1071, sec. 12.
[2] Id., p. 1082, sec. 3.
[3] Id., p. 40, art. IX, sec. 1.
[4] Id., p. 1084, sec. 2.
[5] Wis. R. S., 1858 ed., p. 373, § 1, ch. 41, and 1 S. & B. Wis. R. S., 1878, § 1596.
[6] The Montello, 20 Wall. 430; The Daniel Ball, 10 Wall. 557; Ex parte Boyer, 109 U. S. 630; In re Garnett, 141 id. 15; Morse v. Insurance Co., 30 Wis. 496, op. 505, reluctantly following The Montello at circuit, which subsequently was reversed in supreme court. Wis. River Imp. Co v. Lyons, 30 Wis. 61, op. 66.
[7] Wis. River Imp. Co. v. Manson, 43 Wis. 261; Wis. River Imp. Co. v. Lyons, 30 Wis. 61.

use of the government of the United States, free," etc. * * * Sec. 2. As soon as the territory be admitted as a state, "all the lands granted shall become the property of the state," * * * "provided that the legislature shall agree to accept such grant upon the terms specified in the act, and shall have power" (by its constitution) * * * "*to adopt such kind and plan of improvement* on such route as the said legislature *shall from time to time determine* for the best interest of said state." * * * Sec. 3. The improvement shall be commenced within three years after the admission of the state, and completed within twenty years, "or the United States shall be entitled to receive the amount for which any of said lands may have been sold by the state."[1] * * *

Upon admission into the Union, the state, June 29, 1848, accepted the grant, or assented to the act last aforesaid, and assumed the trust subject to the conditions imposed. It could not do more, and could not assume pecuniary liabilities with respect thereto. By its constitution (art. VIII, sec. 10), the state was prohibited from being a party in carrying on works of internal improvement, excepting under conditions similar to those here arising. Section 10 is as follows:

"Section 10. The state shall never contract any debt for works of internal improvement, *or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion.*"[2]

The first legislature, August 8, 1848, passed the Board of Public Works Act, section 1 of which describes the improvement to be *a work contemplated by congress*, and the more important provisions of which act are given in sections 15 and 16 thereof, and are as follows:

"Sec. 15. In the construction of such improvements, the said board shall have power to enter on, to take possession of and use all lands, waters and materials the appropriation of which for the use of such works of improvement shall in their judgment be necessary.

"Sec. 16. When any lands, waters or materials appropriated by the board to the use of said improvements shall belong to the state, such lands, waters or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the state, and whenever a water-power shall be created by reason of any dam erected, or other improvements made on any of said rivers, such water-power shall belong to the state, subject to future action of the legislature."[3]

By this act a board of public works was raised, upon whom was devolved the duty of adopting a plan and kind of improvement for said rivers, and of constructing the same, by applying thereto the avails of the lands granted by

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[1] Appendix, p. v; Canal Co. Doc., p. 9; 9 U. S. Stat. at Large, 83.
[2] Appendix, p. iii; Wis. R. S., 1858 ed., p. 40; art. VIII, sec. 10.
[3] Appendix, p. vii; C. C. Doc., p. 13; R. S. 1849, p. 765.

congress.[1] For a time the sales of lands were sufficient to carry on the work, but soon thereafter altogether ceased, and. to carry out contracts already entered into, the board, under authority from the legislature, issued certificates of indebtedness, in verification of which the great seal of the state was affixed.[2]

These certificates on their face were declared to be a charge upon the proceeds of the sale of lands granted by congress, and upon the revenues to be derived from the works of improvement. The non-liability of the state upon these certificates was early adjudged by the court;[3] but the fact that they were issued in aid of a work in charge of the state, and over the great seal of the state,[4] caused them to be circulated in the markets of the country as state indebtedness. The fear that these certificates, already issued to a large amount, and circulated as state indebtedness in the markets of the country, in spite of the decision of the court,[5] might in time seriously affect the credit of the state, induced the legislature, July 6, 1853, to create a corporation and transfer to it the works of improvement, *incidental water-powers* and right to acquire lands, all subject to the same trusts in all respects as were imposed upon the state by congress.[6] The company agreed to pay the state indebtedness and fully to execute the trust imposed upon the state, and forthwith undertook the work. In all that the state did towards the construction of the improvement, it acted as the trustee of the United States. In all that the Fox and Wisconsin Improvement Company did, it acted as the *quasi trustee* of the United States.[7] The works of improvement were constructed and continuously belonged to the United States, subject only to the right of tolling the same granted by the state to the improvement company, and the right of the company to the use of the surplus waters incidental to the improvement. Additional lands were granted by congress to the state for the same purpose in 1854 and 1855.[8]

In 1856 the relations between state and the Improvement

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[1] Appendix, pp. viii, ix, x; C. C. Doc., p. 24, ch. 74, Laws of 1849; C. C. Doc., p. 27, ch. 283, Laws of 1850; C. C. Doc., p. 29, ch. 179, Laws of 1851; C. C. Doc., p. 35, ch. 340, Laws of 1852, sec. 12.

[2] Appendix, pp. x, xi; C. C. Doc., pp. 33, 34.

[3] State ex rel. Resley and others v. Farwell, Gov., etc., 3 Pinney, 393.

[4] Appendix, p. xi; C. C. Doc., pp. 31–33.

[5] Appendix, p. xi; C. C. Doc., p. 39, ch. 73.

[6] Appendix, p. xii; C. C. Doc., p. 40, ch. 98, Gen. Laws 1853.

[7] Appendix, p. xvi; C. C. Doc., p. 40, Art. Ass'n, art. VI, referred to in ch. 98, Laws of 1853, especially sec. 2, and Bond and Releases, C. C. Doc., pp. 95, 97.

[8] Appendix, p. xvii; C. C. Doc., pp. 45, 46.

Company were modified.[1] The lands to which the company theretofore had only the right to acquire by retiring state indebtedness so called, as well as the new grants of 1854 and 1855, all were absolutely granted to the company, on condition that it should forthwith execute to three trustees, to be appointed by the governor, a conveyance of the works of improvement, the *incidental water-powers* and all of the lands so granted to the company, in trust to apply all revenues derived from the improvement and from the *incidental water-powers* and the proceeds of the sales of lands: first, to the payment of state indebtedness, and the completion of the construction of the improvement; and second, to the payment of an issue of bonds to be made by the company coincident therewith, and thereafter for the purposes of the company. The trustees so appointed acted for the state, and were by this court held to be state officers.[2]

At this time the company was reorganized. Eastern people were brought in as shareholders, and by an increase of capital stock a large amount of money was raised in the confident expectation that the improvement would shortly thereafter be completed.[3] But the panic of 1857 followed — the sale of lands fell off — marketing the bonds so issued at even an approximation of their face value became impossible; the war came on, and in 1864 the company failed. The deed of trust was foreclosed, and the property of the company, consisting of the works of improvement, that is, the right to toll the works of improvement, *the incidental water-powers* and the lands, all were sold about February 1, 1866, pursuant to decree of court entered February 4, 1864.[4] The parties purchasing were largely the shareholders of the old company, using as purchasing money thereat, to a considerable extent, the certificates of state indebtedness, so-called, which, as individuals, they had been obliged to buy in. The amount realized at the sale was just sufficient to pay the state indebtedness and the sum estimated, by a commission duly appointed, to be necessary to complete the improvement. Thus, in order to raise funds for completing the improvement, it was necessary to sell all of the property of the company, lands, tolls and *water-powers*, including the powers at Kaukauna in question, the same being specially mentioned in schedule (G) attached to the foreclosure judgment and schedules (10 and 13) attached

[1] Appendix, p. xviii; C. C. Doc., p. 46*a*, ch. 112, Laws of 1856.
[2] Butler et al. v. Mitchell, 15 Wis. 389.
[3] Appendix, pp. xxii, xxiii; C. C. Doc., 100*a*; ch. 66, p. 47; ch. 180, p. 48; ch. 289, p. 50; ch. 212, p. 52.
[4] Appendix, pp. xxiii, xxiv; C. C. Doc., 108–141.

to the Report of Sale.[1] By this sale of the water-powers the state surrendered to the United States and the United States received the full avails of all water-powers created by the improvement, the state reserving to itself nothing of the nature of property connected therewith, and retaining in the rivers no greater rights than were had prior to the passage of the land grant act of 1846.

The purchasers became incorporated as the Green Bay & Mississippi Canal Company, and caused to be transferred to the company the works of improvement and *water-works*, all pursuant to legislative permission from the state and United States.[2] And the company so organized continued to hold the works of improvement in relations to the state and *trust relations* to the United States, the same in all respects as those in which they were held by the old company. About this time, 1866, and later, conventions for the consideration of the improvement of water-ways were being called in many parts of the country, north, south, east and west, several of which were held in Wisconsin, and Wisconsin water-ways, notably the Fox and Wisconsin rivers, were considered in nearly all of the conventions wheresoever held. The consensus of opinion was that the work of improving water-ways properly belonged to the United States, and congress was memorialized to make the necessary appropriations, and to give to the public the improved ways freed from toll and imports. So generally did this sentiment obtain that it became impossible for the new company to enlist capital in the enterprise of further enlarging and improving the rivers with a view to securing a fitting return therefor from increased revenues from tolls. This public movement culminated in the congressional act approved July 7, 1870, whereby the United States resumed its own and pledged itself to the further improvement of the navigation of the rivers after such enlarged plan as should be recommended by the chief of the bureau of engineers; and upon which, after a time, tolls were to be reduced to the least sum necessary to keep the improvements in repair. Section 2 of the act authorized the secretary of war to ascertain the sum which in justice ought to be paid to the Green Bay & Mississippi Canal Company as an equivalent for the transfer of

"all and singular its property and rights of property in and to the line of water-communication between the Wisconsin river, aforesaid, and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of the same as in the judgment of such secretary should be needed;"

[1] Appendix, p. xxiv; C. C. Doc., Report of Sale, 122, 124, 125, *129*, 133, and Deed to Canal Co., C. C. Doc., 150–160.

[2] Appendix, pp. xxii–xxvi; C. C. Doc., p. 50, ch. 289, Laws 1861; p. 55, ch. 535, Laws 1865; p. 57, ch. 572, Laws 1866.

and to that end was authorized to join with said company in appointing a board of arbitrators, one of whom should be selected by the secretary, another by the company, and the third by the two arbitrators so selected. In making their award, the arbitrators were required to take into consideration the amount of moneys realized from the sales of lands theretofore granted by congress to aid in the construction of such water communication, which amount should be deducted from the actual value thereof as found by the arbitrators.[1] Pursuant to this act, a hearing by the arbitrators, duly chosen, was had in November, 1871. Say the arbitrators in their report:[2]

"As a water channel it has and can have no value therefor, except in the future by becoming a part of a great through water route between the Mississippi river and Lake Michigan; a route, if once completed, of incalculable value to the people of all of the states east and west." * * * "If congress elects to take the improvement of the company, it is for the purpose of making it a part of that through route, and for that purpose only." * * * "And, therefore, it would seem to be worth as much as it would cost to build such works at the present time, deducting a reasonable sum for depreciation by wear and decay." * * * "In other words, it is worth what it would cost congress to build anew, subject to the depreciation by wear and by time." * * *

In this view of the case, the board fixed the then value, less wear and decay, of all property of the company at $1,048,070, and the amount realized from land sales to be deducted therefrom at $723,070, leaving a balance of $325,000 to be paid to the company. And in anticipation that the secretary of war might decide that the personal property, and "the water-powers created by the dams and by the use of the surplus waters not required for purposes of navigation," were not needed, these water-powers and the water-lots necessary to the enjoyment of the same, subject to all uses for navigation, etc., were valued at the sum of $140,000, personal property $40,000, and the improvement at $145,000.[3]

In reporting this award to congress[4] the secretary of war states: "It is deemed proper to inform congress that it is reliably stated to the secretary that the Green Bay & Mississippi Canal Company is dissatisfied with the foregoing award, and will contest its validity at law." This dissatisfaction arose from the fact that the total amount realized from land sales was deducted from the estimated value of the improvement, less wear and decay, and not from the actual cost of the improvement, shown to be in cash much over $2,000,000, and in securities a much larger sum.

[1] Appendix, pp. xxix, xxx; C. C. Doc., p. 60, ch. 210, U. S. Laws, 1870.
[2] Appendix, p. xxx; C. C. Doc., pp. 62–65 (bottom), 66, top 67.
[3] Appendix, p. xxxii; C. C. Doc., pp. 62, 67, 68.
[4] Appendix, p. xxxiv; C. C. Doc., pp. 71–73.

Whereas by the act as construed for the arbitrators by the attorney-general, they were to deduct the proceeds of land sales from the actual cost and not from the then present value. And this also was the construction which this court subsequently gave to it.[1]

At the time of entering into the arbitration agreement, the company owned, absolutely, the right to toll the works of improvement and incidental water-powers, etc., the present value of which was fixed by the arbitrators at said sum of $1,048,070. Treating the water-powers as did the arbitrators in apportioning the said sum of $325,000 (and we think fairly), i. e., as being of about equal value with the improvement, or right to tolls, and the then present value of the water-powers was nearly one-half of this large sum, or $500,000, or basing the value upon actual cash cost, it was little less than one-half of the total cost, or say $1,000,000. True, the award of the arbitrators in a sum much less than this, thereafter, was reluctantly accepted by the company, but it was accepted because public opinion would not then tolerate the levying of tolls upon public waters, and without tolls there could be no return for moneys expended in enlarging the improvement. It was no longer possible to enlist capital in an enterprise the returns for which must be gathered from tolls to be levied in opposition to the public will.

And from this it appears that the United States has twice received the full avails of the sale of the water-powers. First, in receiving the sum realized therefor at the foreclosure sale in 1866, all of which went to the payment of state indebtedness and the sum necessary to complete the improvement, that is, to the cost of the improvement, a work then and always, excepting as to tolls, etc., belonging to the United States; and, second, in receiving *in effect* the sum at which in the arbitration proceedings the company was required to retain the powers, such sum being deducted from the sum otherwise awarded to the company. By these proceedings, the company, seized of a property which had cost in cash more than $2,000,000, and of the then present value of $1,048,070, was compelled to credit upon that value every dollar realized from land sales, viz., $723,000, and to receive the balance of $325,000 confessedly

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[1] United States v. Jones, 109 U. S. 509, op. 514. Say the court:

"Under this act arbitrators were appointed, the value of the works ascertained and an award made, the amount of which having been paid, the entire property was, in 1872, conveyed to the United States. Since then the United States have been the owners and in possession of the works and con-

due to the company, as follows: In cash, $145,000; in water-powers, $140,000, and in personal property, $40,000. So that in effect the United States received as a consideration for the water-powers $140,000 cash and one-half the proceeds of land sales, together amounting to about $500,000, or, if the actual cash cost of the improvement be considered, to be about $1,000,000.

The secretary recommended to congress that it should take the works of improvement, and not the water-powers and the personal property. And the company, although dissatisfied, pursuant to the award, and the act of congress approved June 10, 1872, making appropriation therefor (ch. 416, Laws 1872), made to the United States its deed bearing date September 18, 1872, transferring the works of improvement, but reserving to itself the personal property and the water-powers in the language following:

> All that part of the franchises of said company, viz.: "The water-powers created by the dams and by the use of the surplus waters not required for purposes of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same; all subject to the right to use the water for all purposes of navigation as the same is *reserved in leases heretofore made by said company*, a blank form of which attached to the said report of said arbitrators is now on file in the office of the secretary of war, and to which reference is here made; and subject, also, *to all leases, grants and assignments made by said company*, the said leases, etc., being also reserved herefrom." [1]

The powers at Kaukauna in question, and especially so far as they were then under lease by the Canal Company, were among the powers by such deed so reserved, and the leases of such powers were also thereby reserved.

By accepting and retaining this deed, and thereby extinguishing all rights of the company to tolls upon the improvement, the United States has assumed its own, and taken exclusive control of the rivers. It may toll the same under the franchise taken, or it may give use of the same to the public free of toll or impost.[2]

It is under obligations similar to those imposed upon the company, even to the maintenance of the improvement until final abandonment. The purchase of franchise and prop-

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gress has made various appropriations to carry on and complete the improvement.

"The arbitrators in making their award proceeded upon the principle that the United States should pay for the works what their construction had cost the state and the companies succeeding to its interests, after making a reasonable abatement for wear and decay, and deducting the amount obtained from the sale of the ceded lands."

[1] Appendix, pp. xl, xli; C. C. Doc., pp. 62, 67, 68, 80, *83*, 84.

[2] Monongahela Navigation Co. v. United States, 148 U. S. 312.

erty was made with the assent of the state.[1] In the redemption of its pledge to make the improvement "a great through water route between the Mississippi and the Lakes,"[2] congress at once adopted plans for its enlargement contemplating

"for the Fox river the replacing of temporary structures with permanent works, the construction of new stone dams, and the widening and deepening of the channels throughout the river and canals to six feet depth and one hundred feet width, and for the Wisconsin river the construction of the channel by dams in order to give increased depth by concentration and scour."

The estimated cost for both rivers made in 1874 and 1876 was $3,745,663. A difference of opinion having arisen in the board of engineers as to the proper method of improving the Wisconsin river, the project for that river was for the time abandoned; but the method for the Fox river was adhered to. It is already apparent that the estimate of cost is inadequate. From about the time of purchase up to the close of the fiscal year ending June 30, 1889, including outstanding liabilities and $145,000 paid to the Green Bay & Mississippi Canal Company, the United States has expended thereon $2,754,873.13, and the appropriations made since 1889 added thereto aggregate a sum for the enlarged work of nearly three and one-half millions, or little less than the estimated cost. The work now is recognized as one of the public works of the country and incorporated in the river and harbor bill for which yearly appropriations are made.[3]

The commerce now seeking this partly-constructed channel is necessarily little or nothing. As a through channel it has no greater capacity than its capacity at its weakest point, and its weakest point, not opened even, is bad enough. But the declared purpose of the government is to provide a suitable and sufficient channel of water communication whereby the commerce of the Mississippi and its tributaries may be united with the commerce of the Great Lakes, each of which to-day is greater than the foreign commerce of the country, whether measured by tonnage or (omitting shipments of gold) by values.

When by the completion of the present plan, or an enlarged one, this unification shall be effected, it is believed that vessels will so shuttlecock through these waters that instead of utilizing for lockages in navigation one one-hundredth part of the flow of the river as now claimed, nearly

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[1] Appendix, p. xxix; C. C. Doc., 62, ch. 416, Laws 1871.
[2] Appendix, p. XLVII; C. C. Doc., 60, 65, 66. *ap.* xxx
[3] ~~Appendix H of the~~ Annual Report of the Chief of Engineers for 1889 to the Secretary of War. Appendix, pp. xxxv-xxxvii.

the entire flow will be used, and there will be little surplus water wasting in front of the riparian owners' lands, and little surplus water for the Canal Company to use.

Utilization of surplus water began at the earliest demand therefor, the Canal Company making a lease as early as 1861,[1] and has extended, until now from one-quarter to one-half of the flow of the river is utilized at points near the first lock, a locality known by the company as the *lower end of the dam*. At this point the company has caused to be erected large and costly mills.[2]

The Canal Company makes claim of title to the exclusive right of use of *all surplus water incident to the improvement*, and to that only for such time as the same be not needed for navigation, and bases its claim *upon grant from the United States* made upon payment of the purchase-price twice over by the Canal Company. The grant is from the United States whether claimed under the trust-deed foreclosure sale, or claimed under the reservation in the deed from the Canal Company to the United States made in 1872, pursuant to the arbitrators' award. The reservation of water-powers made in such deed is a reservation of an easement in property of which the title is vested in the United States, and the easement is held by the Canal Company, in legal effect, the same as under a grant or patent from the United States.[3] The claim is to the *appropriated* waters of the river not needed for navigation. If, contrary to the Canal Company's contention, there be waters not appropriated to the improvement, no claim is made to them in this suit. Here the contention is restricted to the quantity of waters which may be appropriated by the United States without making compensation, the controversy being

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[1] Pr. Rec., p. 365.

[2] Pr. Rec., p. 336.

[3] French v. Carhart, 1 N. Y. 96; Dand v. Kingscote, 6 Mees. & W. 197; Bowen v. Conner, 6 Cush. 132, 136, 137; Borst v. Empire, 5 N. Y. 33, 39; Everett v. Dockery, 7 Jones (N. C.) L. 390; Whitaker v. Brown, 46 Pa. St. 197.

In Fisher v. Laack et al., 76 Wis. 313–320, the court say: "The court will always determine from the nature and effect of the provision itself whether it creates an exception or a reservation. Stockwell v. Couillard, 129 Mass. 231, 7 Am. & Eng. Ency. of Law, 113, and cases cited. The distinction between these terms is thus stated in 1 Sheppard's Touchstone, 80: 'A reservation is a clause of a deed whereby the * * * grantor doth reserve some new thing to himself out of that which he granted before. * * * This doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before.' Hence it was said in Rich v. Zeilsdorff, 22 Wis. 544, that 'a reservation is always of something taken back out of that which is clearly granted, while an exception is some part of the estate not granted at all.'"

over the quantity appropriated, whether all or less than all. The argument made by opposing counsel (be their voluntary concession what it may) logically and necessarily restricts the quantity appropriated to those waters only which in fact are used in passing vessels; and this the court will recognize as the old contention disposed of in the Kaukauna cases, state and federal, and wherein the courts hold that the Canal Company owns the right of use of the surplus waters not needed for navigation; that is, the use of all waters of the river *at the places affected by that litigation.*

A fact stipulated in the case (Pr. Rec., p. 335) is as follows:

"It is admitted that the Green Bay & Mississippi Canal Company has succeeded to the title of the state and of the Fox and Wisconsin Improvement Company as to the work of improvement, and of *the hydraulic power* which the state or Fox and Wisconsin Improvement Company owned."

The hydraulic power to which the Canal Company's title is thus conceded is described in the Board of Public Works Act of 1848, section 16, in the following language, to wit:

"And whenever a water-power shall be created by reason of any dam erected or other improvements made, on any of said rivers, such water-power shall belong to the state subject to *future action of the legislature.*"[1]

And *in such future action of the legislature*, namely, chapter 283, General Laws of 1850, as follows:

"The board * * * are authorized * * * in any future lettings of contracts * * * to *consider bids made*, * * * for improvements which will create a water-power * * * in consideration of the granting by the state * * * forever, the whole or a part of such water-power." And section 3. "When lettings have been made for the improvement of said rivers whereby a water-power is created, the board * * * may relinquish * * * all or a part of such power as a consideration * * * for such performance * * * of such improvement."[2]

And see chapters 275 and 277, General Laws, 1850, and chapter 464, General Laws, 1852, relating to special water-powers;[3] and in the grant of 1853 to the Fox & Wisconsin Improvement Company,[4] the hydraulic power is described as follows:

"The Fox and Wisconsin rivers improvement, together with all and singular the rights of way, dams, locks, canals, water-power and other appurtenances of said works; also," etc.

And in the act of 1856, requiring the Canal Company to execute a trust-deed mortgage thereon, as follows:

"And all the works of improvements constructed or to be constructed on said rivers, and all and singular the right of way, dams, locks, canals, *water-*

[1] Appendix, p. vii; C. C. D., p. 16.
[2] Appendix, p. viii; C. C. D., p. 28.
[3] Appendix, p. xx; C. C. D., pp. 26, 27, 37. Also pp. 135 and 165.
[4] Appendix, p. xii; C. C. D., p. 40; ch. 98, Gen. Laws of 1853.

powers and other appurtenances of said works, and all rights, privileges and franchises belonging to said improvement."[1]

And in the arbitrators' report, as follows, to wit:

"The water-powers created by the dams and by use of the surplus waters not required for the purpose of navigation. * * * The water-powers and lots necessary to the enjoyment of the same, subject to all rights to use the water for all purposes of navigation as the same is reserved in all leases made by said company, and subject also to all leases, grants and assignments made by said company."[2]

And in the deed to the United States, as follows, to wit:

Saving, excepting and reserving "the water-powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those required with reference to the same, all subject to the right to use the water for all purposes of navigation as the same is reserved in leases heretofore made by said company, a blank form of which attached to the said report of said arbitrators is now on file in the office of the secretary of war, and to which reference is here made; and subject, also, to all leases, grants and assignments made by said company; the said lease, etc., being also reserved therefrom."[3]

And the record shows that some of the powers at Kaukauna now in use by the Canal Company were in use and under lease at the time this deed was given, and were, we submit, referred to in said deed by the words "*lots, pieces or parcels of land necessary to the enjoyment of the same*," and by the words "*subject, also, to all leases, grants and assignments made by said company, the said leases, etc., being also reserved therefrom.*"[4]

Against the Canal Company's claim of title the Water Power Company asserts a claim of title based upon facts as shown by the evidence (Pr. Rec., pp. 396–498), of which the following is a substantial statement:[5] Under an early act of congress the land on the south shore opposite the Kaukauna rapids was run out and surveyed into lots in the form of French claims, so-called. These on the south shore at Kaukauna were lots having a narrow frontage on the river, thirteen to the mile, or of about twenty-five rods each, and extending back one and one-half miles.[6]

These lots were so laid out that the cabins of such French

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[1] Appendix, p. xix; C. C. D., p. 46c; ch. 112, Laws of 1856.
[2] Appendix, p. xxxii; C. C. D., p. 67.
[3] Printed Rec., p. 58; C. C. D., p. 83.
[4] As to quantity of power at Kaukauna claimed by Canal Company, see Pr. Rec., pp. 484 and 486, and generally, 466–488; as to leases issued, Pr. Rec., pp. 365, 343, 346, 354, 355; and as shown by answers, Pr. Rec., pp. 163, 172–182.
[5] Pr. Rec., pp. 496–498.
[6] See map attached, and map on file, "Plaintiff's Exhibit A 1."

squatters, if any, or of the early purchasers, could be located all upon the river bank, and so that the occupants all could have access to the river for boating, fishing and as a highway between cabins located on either bank. Had an attempt been made by any squatter on any of these claims to utilize the power opposite his premises, assuming his right to do so, it would have been largely ineffectual, inasmuch as the fall was not sufficient to create a power of much practical use for hydraulic purposes. It was not until the ownership of the claims in question became vested in the present claimants or their trustee, that it became practicable to utilize the fall in the river opposite the same for any considerable useful purpose. And from the statement in the printed record (pp. 496–498) it does not appear that the whole or even the larger part of the fall can now be so used. The lots for the most part were patented about 1837, although entered in 1836, and several in 1835, and in one or two cases several lots appear to have been entered by a single entryman. It was not, however, until between 1871 and 1878 that one Frisbie, apparently acting as agent or trustee for parties subsequently becoming incorporators of the Kaukauna Water Power Company, gathered up the title to a number of them, and in or about 1880 or 1881 caused it to be transferred to the Water Power Company. From this statement it appears that the lands so acquired are in two parcels, lying one in sections twenty-one and twenty-two, having a frontage of about one hundred and twenty-five rods on the upper rapid, and the other in section thirty-six, having a frontage of about sixteen rods, as estimated according to the rules of the government survey, and hence do not connect on the river by a distance estimated according to such survey of at least one mile. This statement also omits all reference to the consideration paid on the several purchases made, and hence does not show the total cost of the lots and lands purchased, nor whether anything was paid specially for the *incidental power* valued at the large figure stipulated in the record. It was in 1881, twenty-six years after the dam was completed, that the Kaukauna Company asserted the first claim publicly made to riparian rights on the south bank (save possibly an old government mill used for the Indians), by constructing a water-power canal tapping the pond above the dam, the use of which was enjoined by this and the state court. It was after the construction of the canal, begun in 1881, that the mills were builded there at large cost, but mills and canal were builded and constructed with full knowledge of the Canal Company's claim of title and after service of written notice to desist.

A statute in force since *February 9, 1841*, prohibits the building of dams in rivers meandered and returned as navigable *without permission from the legislature*,[1] and has been construed by the courts.[2]

ASSIGNMENTS OF ERROR.

The following are the assignments filed in the court below. The modifications in *italics* are added here.[3]

First. That the complaint aforesaid and the respective answers to the plaintiff in error's cross-complaint aforesaid and the matters therein contained are not sufficient in law for the said Patten Paper Company (Limited), Union Pulp Company and Fox River Pulp & Paper Company, plaintiffs below and defendants in error, or for any of said defendants in error, to have or maintain the aforesaid action thereof against said plaintiff in error.

Second. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said defendants in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendants in error.

Third. There is also error in this, to wit: In said suit and the final judgment rendered therein [*in the supreme court of said state, being the highest court therein*], there was drawn in question the validity of a title, right and privilege [*specially set up and claimed by your petitioner*] derived by your petitioner from the United States of America, arising out of acts and proceedings theretofore taken by the United States and by the state of Wisconsin, as the agent of the United States in improving the navigation of the Fox and Wisconsin rivers, under and in pursuance of an act of congress approved August 8, 1846, and also under an act of congress approved July 7, 1870, and another act of congress approved July 10, 1872, and under a certain deed executed by your petitioner September 18, 1872, to the United States of America and accepted by them under the last-named acts, all of which acts of congress and deed are more fully described in the cross-complaint in said suit, and in which sev-

[1] Wis. Genl. Laws, 1840, 1841, p. 34; R. S. 1849, p. 248; R. S. 1858, sec. 2, ch. 41, p. 373; R. S. 1878, sec. 1596.

[2] Of many cases we cite the following: Wis. R. Improvement Co. v. Manson, 43 Wis. 255; Attorney-General v. Eau Claire, 37 Wis. 400; Wis. River Improvement Co. v. Lyons, 30 Wis. 61; Gould on Waters (1st ed.), secs. 134, 531.

[3] School District v. Hall, 106 U. S. 428; Grumble v. Pitkin, 113 U. S. 545.

eral proceedings the state, as the agent of the United States, and the United States granted to your petitioner all the water-powers along the line of water communication between the Wisconsin river and the mouth of the Fox river created by the dams or other works of improvement, and an easement in the line of water communication, its locks, dams and canals, for the protection and preservation thereof, and the decision of said judgment of the said supreme and superior courts was against the validity of such title, right and privilege. [*And in which judgment was drawn in question the validity of an authority exercised under the United States, to wit, the granting of the said water-powers and easement, and the decision is against their validity, and deprives the plaintiff in error of such property without due process of law, and hence is repugnant to the constitution of the United States and the fourteenth amendment thereof.*]

Fourth. There is also error in this, to wit: By and under said judgment of the supreme court of Wisconsin the water-powers and easement in aid of same in controversy, property of said plaintiff in error, were taken from the plaintiff in error, whereby it was deprived of the enjoyment thereof and of its right and title thereto acquired by virtue of the reservation and grant of the United States made in the deed of the said Green Bay & Mississippi Canal Company to the United States, dated September 18, 1872, which reservation and grant from the United States to the plaintiff in error was duly made in proceedings under and duly taken and had pursuant to the acts of congress and of the legislature of Wisconsin mentioned in the plaintiff in error's cross-complaint in said suit and herein briefly referred to, to wit, an act of congress approved August 8, 1846, making a grant of lands to aid in improving the navigation of public waters of the United States, the acts of the legislature of the state of Wisconsin, approved June 29, 1848, accepting the grant made by said act of congress, and August 8, 1848, providing for a board of public works, and the acts amendatory thereof and supplemental thereto, all passed for the purpose and in the execution of the trust created by said act and grant of congress, and the said acceptance thereof; the acts of the legislature approved July 6, 1853, and October 3, 1856, and the acts amendatory thereof and supplemental thereto, transferring the execution of said trust to the Fox & Wisconsin Improvement Company and its successor, the Green Bay & Mississippi Canal Company, and the acts of congress approved January 7, 1870, and July 10, 1872, and acts of congress and of the legislature supplemental thereto, providing for the acquisition by the

United States of the property and rights of property of the Green Bay & Mississippi Canal Company in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including the works of improvement, etc., to all of which reference is here made, and by which said judgment the said acts of congress and of the legislature of the state were so interpreted and enforced, and the proceedings of the United States and the state thereunder so far annulled, set aside and held for naught that the right and title to said water-powers and easement so acquired by the plaintiff in error were destroyed, the said decision being against the right and title of said plaintiff in error set up and claimed under said acts of congress. [*And in which judgment rendered by the highest court in said state was drawn in question the validity of an authority exercised under the United States, to wit, the granting of the said water-powers and easement, and the said decision is against their validity and deprives the plaintiff of such property without due process of law, and hence is repugnant to the constitution of the United States and the fourteenth amendment thereof.*]

Fifth. There is also error in this, to wit: The water-powers and easement in question were acquired under proceedings had pursuant to the said acts of congress, and especially the act approved July 7, 1870, by which act the arbitrators were, in effect, required to award to the Canal Company the cost of the works of improvement, less depreciation by wear and decay and less proceeds of the sales of lands granted by congress in aid thereof; and in case the secretary of war should elect not to take all of the property and rights of property of the Canal Company in such work of improvement, they should deduct a corresponding part of the cost aforesaid, which should be withheld from the Canal Company. The secretary of war did elect not to take the water-powers created by the dams and by the use of the surplus water not required for navigation, with the rights of protection and preservation appurtenant thereto, and did elect to leave the same to the company and require the company to surrender of the award a large and corresponding part thereof. The water-powers and easement in aid thereof in controversy were part of the water-powers so left to the company and for which abatement from the award was made and in substance were specially described in the report of the arbitrators as water-powers then under lease and in use by said company. The judgment deprives the Canal Company of the water-powers and easement in controversy and creates an obligation on the part of the United States to

pay to said company the value of such powers and easement or the money value or cost thereof so withheld improperly unless there be error in such judgment. The decision of said judgment is against the right, title and privilege set up and claimed by the plaintiff in error under the acts of congress and the state in the aforesaid third and fourth assignments of error and in the cross-complaint in said suit mentioned and to which reference is made. [*And in which judgment rendered by the highest court in said state was drawn in question the validity of an authority exercised under the United States, to wit, the granting of the said water-powers and easement, and the said decision is against their validity and deprives the plaintiff of such property without due process of law, and hence is repugnant to the constitution of the United States and the fourteenth amendment thereof.*]

Sixth. There is also error in this, to wit: Plaintiff in error's title, right and privilege to the water-powers and easement in aid thereof in controversy were considered by this the supreme court of the United States in the case of The Kaukauna Water Power Company and others, therein plaintiff in error, and The Green Bay & Mississippi Canal Company, therein defendant in error, reported in volume 142 of the United States Reports, at pages 254, etc., and upon the same facts the said title, right and privilege were sustained by this court, and the plaintiff in error now here was adjudged to be the owner thereof, the said court adjudging —

That 'under the circumstances of this case, we think it within the power of the state to retain within its immediate control such surplus as might incidentally be created by the erection of the dam' (here referring to the dam in question). * * * 'The dam was built for a public purpose, and the act provided that if in its construction any water-power was incidentally created it should belong to the state, and might be sold or leased in order that the proceeds of such sale or lease might assist in defraying the expenses of the improvement.'

The water-powers and easement in controversy were under lease and in use by the plaintiff in error at the time the judgment of this court in the aforesaid suit was entered, and at the time the said suit was commenced, and were so used in all respects the same as they were being used at the time of the commencement of the suit now here before the court and the entry of judgment herein. The dam in question extends from the south bank of the river to the first lock on the north bank; or if any part thereof be canal and not dam, the 'work of improvement' extends from the 'cross-dam'

to the said first lock. The decisions of the said judgment of the supreme court of Wisconsin are against the title and right of the Canal Company, plaintiff in error, to the water-powers so created by said dam and other work of improvement, and the use of the surplus water not needed for navigation, acquired by the plaintiff in error by purchase under authority exercised under the United States and sustained by this court, and are against the title and right sustained by this court, to wit, title and right of the Canal Company, plaintiff in error, to the water-powers created by the said dam and the use of the surplus waters not needed for navigation, and are against the title, right and privilege set up and claimed by the plaintiff in error under the acts of congress and of the legislature in the aforesaid third and fourth assignments of error mentioned. [*Whereby in the said judgment of the supreme court of Wisconsin, being the highest court of said state, there is drawn in question the validity of an authority exercised under the United States, and the decision is against its validity, thereby depriving the plaintiff in error of property without due process of law, and hence is repugnant to the constitution of the United States and the fourteenth amendment thereof.*]

Seventh. There is also error in this, to wit: The water-powers and easement in aid thereof in controversy, property of the plaintiff in error, were taken by the United States and the state, acting for the United States, for a public purpose, and were sold and granted to the plaintiff in error, yet thereafter, by and under the said judgment of the supreme court of Wisconsin [*being the highest court of said state*], the same were adjudged to be so taken under the acts of congress and of the legislature in the third and fourth assignments of error mentioned, as interpreted and enforced by said judgment, for a private and not for a public purpose, and the said plaintiff in error is thereby deprived of his said property without due process of law and contrary to the provisions of the fourteenth amendment to the constitution of the United States.

Eighth. It was error for the said supreme court of Wisconsin to decide that the acts of congress and of the legislature in the aforesaid third and fourth assignments of error mentioned, more particularly the acts of congress approved August 8, 1846, and July 7, 1870, and the act of the legislature approved August 8, 1848, as construed, interpreted and enforced by its said judgment, did not authorize and direct the taking of all of the water-powers created by reason of the dam and works of improvement in question, and the use of all waters over and above that which was re-

quired for the purposes of navigation, and did decide against the validity of the said acts of congress and of the legislature to authorize and direct the taking of the same as aforesaid, and in so deciding it did deprive the plaintiff in error of its property without compensation and without due process of law, and contrary to the provisions of the constitution of the United States and of the fourteenth amendment thereof.

Ninth. There is also error in this, to wit: That by the said final judgment the supreme court of Wisconsin enforced the said acts of congress of August 8, 1846, and July 7, 1870, and of the legislature of Wisconsin, approved August 8, 1848, so as to deprive the plaintiff in error of its property without due process of law and contrary to the provisions of the constitution of the United States and the fourteenth amendment thereof.

Tenth. There is also error in this, to wit: By and under said judgment the supreme court of Wisconsin in holding and deciding that the Canal Company, plaintiff in error, be perpetually enjoined from drawing water for hydraulic power from the canal or extension of the dam down to the first lock, thereby deprived the plaintiff in error of the value of its aforesaid water-powers and the easement in aid thereof in controversy, acquired from the United States, and takes and appropriates to private purposes the waters taken by the state, acting for the United States, for public purposes, and therein decides against the right and title of the plaintiff in error in and to the same and against the validity of the said acts of congress, approved August 8, 1846, and July 7, 1870, and of the legislature, approved August 8, 1848, so far as the same are involved in such holding, and takes the property of plaintiff in error for a private purpose without due process of law and contrary to the provisions of the constitution of the United States and the fourteenth amendment thereto.

Eleventh. There is also error in this, to wit: The original suit herein was between the Patten Paper Company (Limited) and others, plaintiffs, against the Kaukauna Water Power Company and others, its tenants, defendants, to enjoin a diversion of water by the Kaukauna Water Power Company and its tenants, defendants, to which suit the Green Bay & Mississippi Canal Company and others, its tenants, were made parties defendant for the sole purpose of having before the court all the parties interested in the water-power. The title of the Green Bay & Mississippi Canal Company as riparian owner of the north bank of the river and their right to use the water-power appurtenant to

he north bank of the river from the pond through their canal was admitted in the complaint, and the right of the Kaukauna Water Power Company, as riparian owner of the south bank of the river, to draw one-sixth part of the water from the pond through its canal down the river and below the pond of the plaintiff was also admitted or not controverted in the complaint. The Kaukauna Water Power Company answered, claiming its right as riparian owner of the south bank of the river to draw the water appurtenant to the south bank of the river through its canal and discharge the same into the river below the pond of the plaintiffs. The Green Bay & Mississippi Canal Company answered, admitting its claim of title to the north bank of the river and admitting and asserting its right to draw and that it did draw through its canal the water appurtenant to the north bank of the river, and did discharge it through the mills of its tenants into the river at the head of the pond of the plaintiffs. It also filed a cross-complaint in the nature of a cross-bill, in and by which it claimed as the grantee of the state and of the Fox & Wisconsin Improvement Company, by reason of having constructed the dam, improvement and canal in question under the acts of congress and of the state legislature, the whole of the water-power of the river created by the dam, the works of improvement, and the canal in question, including the pond in question. The plaintiffs and the other defendants not tenants of the Canal Company deny this claim of the Canal Company, and on the trial before the superior court the issues only were tried which were raised upon the cross-complaint, and judgment was rendered thereon [*in the superior court of Wisconsin, pursuant to mandate of the supreme court, being the highest court of said state*], sustaining the claim of the Canal Company, which judgment adjudges, among other things, as follows, to wit:

'That the defendant The Green Bay & Mississippi Canal Company is the owner of and entitled as against all of the parties to this action and their successors, heirs and assigns to the full flow of the river not necessary for navigation from the said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids or directly from the pond, and use the same from said canal or said pond and let such water to others to be used wherever it may be available for water-power and re-

turn the same to the river where it shall see fit, and is not obliged to permit any of the water from the river or pond to flow over said dam; and,

Second. It is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay & Mississippi Canal Company and so withdrawing and using such water.

Third. It is further considered, adjudged and decreed as in favor of the Patten Paper Company against all the other defendants that all the water of the river which is permitted by the Green Bay & Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4 so as to pass down the river should be, and it is hereby, divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns, and the Green Bay & Mississippi Canal Company and its successors and assigns, between and to the South, Middle and North channels of the river in the following proportions: that is to say, 43-200 part of the water so permitted to flow down the river of right should flow down the South channel, 157-200 of the whole flow of the river so permitted to flow over the dam should of right flow down the Main channel of the river north of Island No. 4, and that of the water so permitted to flow down the Main channel of the river north of Island No. 4, and above the Middle channel, 62-157 thereof should of right flow down the Middle channel and south of Island No. 3, and that of the water flowing down the North channel north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the North channel and north of Island No. 3, and each of the other parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so permitted to flow over the dam or into the river above Island No. 4, so as to prevent their flowing into said channels in the proportions aforesaid.'

And from which judgment three separate appeals were taken, one by the Patten Paper Company and others, plaintiffs in said main action, another by the Kaukauna Water Power Company, its tenants, and others, defendants in said main action, and one by Henry Hewitt, Jr., and William P. Hewitt, defendants in said main action, all of such appeals being from parts of the judgment rendered and entered herein on the issues joined on the said cross-complaint of the Green Bay & Mississippi Canal Company on the said 19th day of January, 1894, which appeals took to the supreme court only the issues raised by the cross-complaint and the

answers thereto; that upon the hearing before the supreme court of Wisconsin that court reversed the judgment and remanded the cause, with directions to enter judgment according to the opinions delivered by that court. Upon the return of the record the superior court of Milwaukee county rendered a judgment in the cause pursuant to the mandate, omitting all consideration of the plaintiff's original complaint and answers thereto in the main action, by which judgment so entered there is taken from the Canal Company the right to draw the water from the pond through the canal on the north side, and requires it to return the water from the pond into the river at or near the foot of the dam, and thereby deprive the Canal Company and its tenants of the right to carry the water appurtenant to the north bank of the river from the pond through the canal on the north side of the river and discharge it through the mills into the river below, contrary to the admissions in the complaint of the plaintiffs and the answer of the Kaukauna Water Power Company, which company was the principal defendant in said suit. From this judgment last mentioned the Canal Company appealed to the supreme court of Wisconsin, and the supreme court, on motion of the plaintiffs in the original cause and the Kaukauna Water Power Company and its tenants, defendants, dismissed such appeal on the ground that the judgment entered was made in accordance with the mandate of the supreme court, and subsequently thereto, on the consideration of a motion made by the Canal Company to reinstate said appeal entertained by the court, entered its order denying the same upon the merits on the 5th day of May, 1896, and whereby the said judgment of the superior court did not become the final judgment in said suit and the judgment of the supreme court until the entry on the 5th day of May, 1896, of said order denying said motion; that in and by said judgment so become final the Canal Company is deprived of its property, to wit, the right to draw the surplus water from the pond through its canal and to discharge the same through the mills of its tenants into the river below, so that it is prevented from uniting its water-power in the pond above the cross-dam, adjudged to it by the supreme court of the United States (142 U. S. 254), with the fall on its own land between the pond above the cross-dam and the place of discharge in the river, and this is effected by the judgment of the supreme court in an action in which it never had jurisdiction of the question, but had only jurisdiction of the question as to whether the Canal Company, as grantee of the United States, the state and the Fox & Wisconsin Improvement Company, which had created this water-power under the acts afore-

said, was the owner of the whole of the water-power created by said dam and works of improvement on the Kaukauna rapids or not, and in so deciding the supreme court of Wisconsin [*the highest court of the state*] did deny the rights so acquired from the United States by the plaintiff in error, and did declare against the validity of the title and right acquired through proceedings duly taken under the acts of congress and of the legislature aforesaid, and thereby deprive plaintiff in error of said property without due process of law and contrary to the provisions of the constitution and the fourteenth amendment thereof."

[*Twelfth. Plaintiff further assigns as error that the state courts not having jurisdiction therefor, in and by said orders and judgment, took away from the plaintiff in error its right to withdraw the water appurtenant to the north bank of the river from the pond through the canal, and discharge the same through its mills and the mills of its tenants for water-power as it and they had been accustomed to draw the same for more than thirty years, although no pleadings in the case prayed that such right be taken away, and although such right is admitted by the plaintiff, and by all of the defendants in their pleadings: Whereby the plaintiff has been deprived of its said right to draw the water which is appurtenant to the north bank of the river from said pond through the canal and through its mills and the mills of its tenants, and discharge it into the North channel of the river below said mills, without due process of law.*]

PROPOSITIONS.

These assignments of error present the following three general propositions:

1. The state courts were *without jurisdiction* to pass the judgment entered in the case whereby the Canal Company, plaintiff in error, is deprived of its rights of property without due process of law, in violation of the constitution of the United States and the fourteenth amendment thereof. (NOTE.—This proposition relates to the part of the river pertaining to the north bank.)

2. The judgment entered in the case deprives the plaintiff in error of the right to use for power the water of the river acquired directly and indirectly from the United States:—indirectly, through legislative grant from the state, acting

for the United States, and later, directly, through an easement created upon property then vested in the United States as sovereign; and this without due process of law and in violation of the constitution of the United States and the fourteenth amendment thereof.

(Subheads. 1. The federal questions presented. 2. The lawfulness and extent of the appropriation made by the United States and the state acting for the United States, and the uses to which the appropriation may be put. 3. The extent to which these questions have already been determined by this court.)

3. Assuming that the rights of property in question were taken in the exercise of eminent domain, *a proposition which is unqualifiedly controverted and denied*, nevertheless the judgment entered in the case deprives the plaintiff in error of such rights of property, without due process of law, and in violation of the constitution of the United States and the fourteenth amendment thereof.

I.

THE STATE COURTS WERE WITHOUT JURISDICTION TO PASS THE JUDGMENT ENTERED IN THE CASE WHEREBY THE CANAL COMPANY, PLAINTIFF IN ERROR, IS DEPRIVED OF ITS RIGHTS OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE FOURTEENTH AMENDMENT THEREOF. (NOTE.—This proposition relates to the part of the river pertaining to the *north* bank.)

(a) The notice of appeal from the judgment of the superior court to the supreme court of the state limited the appeal to a certain part of the judgment rendered. This limited appeal left all the rest of the case, whatever there was of it, before the superior court.

(b) Because the pleadings of the defendants in error made in the superior court admit the right of the Canal Company to draw water from the pond through the canal on the north

side into the mills of the Canal Company's tenants, and there use it for water-power, and the orders and judgment which take away that right are in excess of the jurisdiction of the courts, and are not due process of law.

This proposition is discussed in the separate briefs of counsel for the plaintiff in error (E. Mariner and B. J. Stevens), filed on the motion to dismiss, and in additional brief by Mr. Mariner, to all of which reference is made.

The suggestions by which counsel are impressed are deemed to be given therein with sufficient fullness for submission to the court; the contention being that the judgment of the superior court entered pursuant to the mandate of the supreme court, and thereby become the judgment of the latter court, is entered *without jurisdiction of the subject-matter as affecting the part of the river pertaining to the north bank.* The notices of appeal whereby jurisdiction was conferred were by expressed terms so limited as to exclude jurisdiction with respect thereto. And not only was jurisdiction excluded by the appeal, but also was excluded *even from the lower state court by the pleadings themselves.* The right of the use of the part of the river pertaining to the north bank as it had been and was then being used was admitted in the complaint, set up and claimed in the answer and cross-bill of the Canal Company, and again admitted in the answers made to the cross-bill by the Water Power Company and tenants and by the Hewitts. (Pr. Rec., pp. 84, 118, 163, 172, 182.) To meet the Canal Company's claim of title by prescription set up in the cross-bill, these answers were swift to charge that the part of the river pertaining to the north bank had been and was being used by the Canal Company, *rightfully* under riparian title, and consequently that the possession of the Canal Company was not adverse, and hence not the basis for title by prescription. Without pleadings putting in controversy, but on the contrary admitting, the Canal Company's title to the north bank of the river and its long accustomed rightful use of water from the pond through the canal, and with its jurisdiction by

appeal expressly restricted to exclude the controversy, even had it by the lower court been assumed to have existed, the supreme court gave judgment, to the Canal Company's great damage, denying its title and right of use for power of the flow of the river pertaining to the north bank, and perpetually enjoining the company from further making such use, thereby depriving the company of its property without due process of law.

II.

THE JUDGMENT ENTERED IN THE CASE DEPRIVES THE PLAINTIFF IN ERROR OF THE RIGHT TO USE FOR POWER THE WATER OF THE RIVER ACQUIRED DIRECTLY AND INDIRECTLY FROM THE UNITED STATES, — INDIRECTLY THROUGH LEGISLATIVE GRANT FROM THE STATE ACTING FOR THE UNITED STATES, AND LATER, DIRECTLY, THROUGH AN EASEMENT CREATED UPON PROPERTY THEN VESTED IN THE UNITED STATES AS SOVEREIGN, AND THIS WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE FOURTEENTH AMENDMENT THEREOF. (Sub-heads. 1. The federal questions presented. 2. The lawfulness and extent of the appropriation made by the United States and the state acting for the United States, and the uses to which the appropriation may be put. 3. The extent to which these questions have already been determined by this court.)

1. *The federal questions* presented. (Sub-heads. (a) Legislative source of title. (b) Reservation of easement. (c) Rights acquired under arbitration proceedings.)

(a) *Legislative Source of Title.* — The source of Canal Company's title so far as based on legislation, federal and state, — the ordinance of 1787, acts of congress relating to the admission of Wisconsin into the Union, the constitution of Wisconsin, etc., and various acts of the state legislature, particularly the board of public works act of 1848, the grants of 1853 and 1856, and foreclosure proceedings against the

Fox & Wisconsin Improvement Company,—*is admitted* (Pr. Rec., p. 335), by stipulation, as follows:

"*It is admitted that the Green Bay & Mississippi Canal Company has succeeded to the title of the state and of the Fox & Wisconsin Improvement Company as to the work of improvement and all the* HYDRAULIC POWER *which the state or Fox & Wisconsin Improvement Company owned.*"

Section 16, act of 1848, declares that "whenever a water-power shall be created by reason of any dam erected or other improvements made on any of such rivers, *such water-power* shall belong to the state, subject to future action of the legislature."

That such title or right of use of water emanated from the title of the United States to property held in trust by the state, and that the state, in making the grant thereof to the Fox & Wisconsin Improvement Company, acted vicariously for the United States, we think is clear.

By the ordinance of 1787 and the acts of congress hereinbefore referred to, and hereinafter more fully referred to, congress took control of the Fox river, and of the Wisconsin river below the Portage, and thereby segregated them from other waters and other navigable waters of the state, and because of their interstate character classed them with the *navigable waters of the United States*, as distinguished from the *navigable waters of the state*. And the state, prohibited by its constitution from engaging in works of internal improvement and permitted only to aid in carrying on such works by applying thereto the proceeds of the sales of lands granted therefor, undertook as the trustee and agent of the United States to adopt a plan for the improvement of said rivers, and applied thereto through its board of public works the avails of the grant of lands made by congress therefor. The board adopted a plan for the improvement which, though subsequently enlarged, was carried out, and, as enlarged, is the improvement as now constructed, including as an integral part thereof the dam with its cross-section and extension down stream hereinbefore described. Later than 1846 congress made other grants of land in aid of the

same work, the proceeds of which, together with those of the grant of 1846, were by the state and by the Fox & Wisconsin Improvement Company and the plaintiff in error, grantees of the state, applied to the construction thereof. The state finding itself embarrassed in the conduct of the work had through legislative grants made in 1853 and 1856 turned it over with its trust obligations to the Fox & Wisconsin Improvement Company, and hence the co-operation of these companies in the application of the proceeds of the sales of lands. Still later, congress acquired from the Canal Company a transfer of its property and rights of property in the works of improvement so constructed, for the purpose of again enlarging and extending the same and making it as extended a through channel of commerce connecting the Mississippi with the Great Lakes; a work now undertaken by congress *only on the theory* that it is a work for the improvement of navigable waters of the United States. It was not a state work, for the state was inhibited from engaging in such works, and necessarily, therefore, was from the outset a work of the United States and is now held as such by the United States. Whatever property rights acquired by the state, be they what they may, were so acquired. And, so far as capable of disposition, were disposed of by the state acting as trustee of the United States. The underlying rights in or title to the work as a channel of commerce, being rights and title not the subject of grant, and hence wholly incapable of irrevocable disposition by the state and by the United States, were at all times necessarily ~~one~~ rights remaining in the United States.

The Canal Company's original title or right of use so far as it rests on legislative grant, covering with other rights all right to toll the commerce on the improvement, and the right to use the surplus waters for power, etc., is, we think, clearly a title or right emanating from the United States. That the water-powers at Kaukauna in controversy, including the right to use for power the water of the pond by drawing it from the canal or dam extension, so called, and

discharging it into the North channel at the place where the Canal Company has heretofore been using the same, were a part of the water-powers acquired by the Canal Company under such grant, appears from the record, as we contend, and these powers to some extent have been in use at this particular place for nearly forty years, as far back as 1861 (Pr. Rec., p. 365), about a quarter of a century, more or less, prior to the making, so far as we are advised, of any claim to ownership of power by riparian owners of the south bank of the river.

(b) *Reservation of Easement.*— Whatever may have been the character of the Canal Company's title or interest in the work of improvement, especially in the water-powers created thereby, prior to the transfer made in 1872 to the United States, whether an easement or a broader claim of title, nevertheless, since then the company's interest in such water-powers has been and is, we think, only that of an easement in property owned by the United States.

In execution of an agreement made between the United States and the Canal Company at the foot of arbitration proceedings had pursuant to acts of congress, approved July 7, 1870, and June 10, 1872,[1] the Canal Company made its deed of transfer, bearing date September 18, 1872,[2] whereby it transferred to the United States

"all and singular, its property and *rights of property* in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its *locks, dams, canals and franchises*, saving and excepting therefrom, *and reserving* to the said party of the first part, the following described property, rights and portions of franchises, which, in the opinion of the secretary of war and of congress, are not needed for public use, to wit: First, * * * Second. Also all that part of the franchises of said company, viz., *the water-powers created by the dams and by the use of the surplus water not required for the purpose of navigation*, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same; *all subject* to the right to use the water for all purposes of navigation, as the same *is reserved in leases heretofore made by said company*, a blank form of which attached to the said report of said arbitrators is now on file in the office of the secretary of war, and to which reference is here made, and subject, also, to all *leases, grants and easements made by said company*, the said leases, etc., being also reserved herefrom."

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[1] Appendix, pp. xxvii–xxxv.
[2] Appendix, p. xxxiii.

By this deed full title to the entire property, water channel and work of improvement, not already theretofore vested in the United States, became vested therein, subject to a reservation of the water-powers created thereby and thereon, saving only the title to certain lots and pieces of land necessary to the use of the powers. These lots are not the lands or real property on which the powers are created or on which they lie, but are the mere places designed for the use of the powers. The lands on which they lie extend up and down the stream for a long distance.

Chief Justice Gibson (*supra*) defines water-power to consist

"*of the fall in the stream when in its natural state* as it passes through his land or along the boundary of it; or, in other words, *it consists of the difference of level* between the surface where the stream touches his land and the surface where it leaves it."

The water-powers created on lands so extending up and down the stream are not separated in the deed from the channel of commerce property. The real property included in the designation "work of improvement" is the same real property largely as that upon which the "water-powers" are created. There is no separation made or attempted by which the water-power property is distinguished and separated from the channel of commerce property, and clearly enough none can be made. The dams, canals, etc., were by special designation transferred to the United States, and the United States took possession and control of the same. It is alleged in the Water Power Company's answer to the complaint (Pr. Rec., p. 134, line 46, and p. 136, line 28) that the *United States owns* the canal and the embankment from and through which at Kaukauna the waters for power use are drawn. It follows, we think, that the company's title or interest in the water-powers is that of an easement in property held and owned by the United States, for, on receiving the deed, the United States became vested with full and complete title to the entire property, upon which is created by its own assent, shown by the acceptance of the deed, the easement in favor of the Canal Company. It is

not a title or interest excepted from the property transferred, for there is no line of separation indicated, nor could one be indicated by which the estate excepted is separated and distinguished from the estate transferred. *It is a new estate or interest created by the deed.* It is an estate or interest which the Canal Company could not have created in its own favor prior to the deed, while all or much of the property was vested in itself; for an easement on property merges in the title to the property when both are in one and the same ownership. It could only be created by the deed with the assent of the United States, as shown by its acceptance of the deed. It was part of the property transferred, and is carved out therefrom by the assent and act of the United States on the vesting of the estate transferred. Say the Wisconsin supreme court in Fisher v. Laack et al. (76 Wis. 313–320):

"The court will always determine from the nature and effect of the provision itself whether it creates an exception or a reservation. Stockwell v. Couillard, 129 Mass. 231; 7 Am. & Eng. Ency. of Law, 113, and cases cited. The distinction between these terms is thus stated in 1 Sheppard's Touchstone, 80: 'A reservation is a clause of a deed whereby the * * * grantor doth reserve some new thing to himself out of that which he granted before. * * * This doth differ from an exception, which is ever a part of the thing granted, and of a thing *in esse* at the time: but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before.' Hence it was said in Rich v. Zeilsdorff, 22 Wis. 544, that 'a reservation is always of something taken back out of that which is clearly granted, while an exception is some part of the estate not granted at all.'"

See, also, Washburn on Easements, 3d ed., p. 6; p. 8 (3–5), p. 10 (2) and p. 29 (5).

The reservation is in all respects the same in legal effect as a patent from the United States. In French v. Carhart, 1 N. Y. (Court of Appeals), p. 96, op. 103, the court say:

"This reservation should be construed in the same way as a grant by the owner of the soil of a like privilege; for the rule is, that what will pass by words in a grant will be excepted by the same words in an exception. (Sheppard's

Touchstone, 100; 1 Saunders, 326, n. 6; Doud v. Kingscote, 6 Mees. and Wels. 197; Hinchliffe v. Kennard, 5 Bing. N. C.)"

And in Borst v. Empie, 5 N. Y. (Court of Appeals), 33-38:

"For a reservation is always of something issuing or coming out of the thing or property granted, and not a part of the thing itself, and to be good it must always be to the grantor, or party executing it, and not to a stranger to the deed. (1 Preston's Shep. Touch. 80.)"

That this reservation of water-powers covers the powers on the dam extension or government canal is beyond question, as appears from the record. The language of the reservation is, "the water-powers created by the dams, etc., all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company; * * * and subject also to all leases, grants and easements made by said company, the said leases being also reserved herefrom."

And from the record (Pr. Rec., p. 365), it appears that at least two leases at this place had been made by the company prior thereto. And that these powers were reserved also appears from the foreclosure judgment and report of sale thereunder. It is submitted that the Canal Company, as such reservee under said deed, became in effect the grantee of the United States of an easement upon the property of the United States consisting of the right of use of the water-powers in question.[1]

(c) *Rights Acquired Under Arbitration Proceedings.*—For the facts on which these rights rest, see Statement, pp. 28 to 32 of this argument. It is there stated that a large amount of money, in excess of two millions of dollars, had prior to the arbitration been expended upon the works of improvement then *owned* by the Canal Company so far as capable of private ownership, of which sum the government contributed as the proceeds of land sales only the sum of $723,070. The act of congress approved July 7, 1870,[1] pro-

[1] Appendix, p. xxvii.

viding for arbitration proceedings, required in substance (sec. 2) that the arbitrators should ascertain

"The sum *which ought in justice* to be paid to the Green Bay & Mississippi Canal Company * * * as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises," etc., * * * "*provided* that in making their award the said arbitrators shall take into consideration the *amount of money* realized from the sale of lands heretofore granted by congress to the state of Wisconsin to aid in the construction of said water communication, *which amount shall be deducted from the actual value thereof as found by said arbitrators.*"

The effect upon the body of the section to be given to the proviso determines the rule to control the arbitrators in making their award. If it was the intention that the sum referred to in the proviso as the "*actual value of the work*" is one and the same with the sum referred to in the body of the section as that "*which ought in justice to be paid,*" then the requirement to deduct therefrom the amount of money realized from land sales became an act of injustice. To deduct any sum whatever "from the sum which ought in justice to be paid" is an act of injustice so obvious that it is not to be presumed that such was the intention of congress. It may be that the sum referred to in the body of the section as that "which ought in justice to be paid" is restricted by the proviso so far that it cannot exceed the balance after deducting the amount of land sales from the "actual value" of the work. But, on the other hand, it follows, we think, that the clause requiring the arbitrators to deduct the full amount of land sales, that is, to deduct the full amount of that part of the joint expenditure which the government put into the work, also requires the arbitrators to leave to the companies the full amount of their part of the joint expenditure, so that the "actual value" to be found by the arbitrators may be more, *but cannot be less*, than the sum total of the expenditures up to that time made

by the government and the companies. It is apparent that some restriction attaches to the amount designated as the "actual value." If there were no restriction, it would be possible for unwise or unjust arbitrators to fix that amount at a sum less than the amount of land sales, in which event the balance of the proviso would be inoperative, because the requirement is, that the amount of land sales shall be *deducted*, evidently from some greater amount; and the body of the section would be inoperative because it proceeds upon the theory that there *is* a sum which in justice ought to be paid to the company; and by the proposed deduction there would be left no sum whatever, but an obligation on the part of the company to pay a balance to the government. The restriction which attaches to the phrase "actual value" is not simply that the "actual value" cannot be less than land sales, but is broader, namely, that it cannot be less than the joint expenditures up to that time. The moneys realized from the sale of land were from time to time applied to the work during its entire progress conjointly with the moneys applied thereto by the companies. If the "actual value" of the work was less than the joint expenditures, it would follow that the interest in the work resulting from the expenditures made by the government would be less in value than the amount of such expenditures. So that the clause requiring the arbitrators to deduct the *full amount* of land sales would become a direction to them to credit the government with an interest in the work greater than that resulting from its expenditures, and with some portion of the interest in the work resulting from the expenditures made by the companies, which would be a taking of the company's property as unjust as any other mode of taking property for which there is no right. And hence it follows, we think, that the award should be the cost of the work less proceeds of land sales and wear and decay.

Say this court, speaking of the theory of the award (United States v. Jones, 109 U. S. 513, op. 514):

"Under this act arbitrators were appointed, the value of the works ascertained, and an award made, the amount of

which having been paid, the entire property was, in 1872, conveyed to the United States. Since then the United States have been the owners and in possession of the works, and congress has made various appropriations to carry on and complete the improvement.

"The arbitrators, in making their award, proceeded upon the principle *that the United States should pay for the works what their construction had cost* the state and the companies succeeding to its interests, after making a reasonable abatement for wear and decay, and deducting the amount obtained from the sale of the ceded lands."

Whether the arbitrators followed this theory or statutory rule in making their award or not is at this time not the question. The award, so far as it fixed a sum of money for payment, was accepted; but this review of the statute determines the theory of the award and its proper interpretation.

By their report and award, the arbitrators "fixed the then value, less wear and decay, of all the property of the company at $1,048,070, and the amount realized from land sales *to be deducted therefrom* at $723,070, leaving a balance of $325,000 to be paid to the company, and in anticipation that the secretary of war might decide that the personal property, and 'the water-powers created by the dams and by the use of the surplus waters not required for the purposes of navigation,' were not needed, valued these water-powers and the water-lots necessary to the enjoyment of the same, subject to all uses for navigation, etc., at the sum of $140,000, personal property $40,000, and the improvement at $145,000.

At the time of entering into the arbitration agreement the company owned, absolutely, the right to toll the works of improvement and incidental water-powers, etc., the present value of which was fixed by the arbitrators at said sum of $1,048,070. Treating the water-powers as did the arbitrators in apportioning the said sum of $325,000 (and we think fairly), i. e., as being of about equal value with the improvement, or right to tolls, and the then present value of the water-powers was *nearly one-half* of this large sum, or $500,000, or, basing the value upon actual cash cost, it was little less than one-half of the total cost, or say $1,000,000.

By these proceedings the company, seized of a property which had cost in cash more than $2,000,000, and of the then present value of $1,048,070, was compelled to credit upon that value every dollar realized from land sales, viz., $723,070, and to receive the balance of $325,000 confessedly

due to the company, as follows: In cash, $145,000; in water-powers, $140,000, and in personal property $40,000. So that in effect the United States received as a consideration for the water-powers $140,000 cash and the equivalent of one-half the proceeds of land sales, together exceeding the sum of $500,000." At least this is the loss to the Canal Company.

It is this large sum which was the consideration price paid by the Canal Company for the *grant to it by way of easement* of the water-powers created by the improvement, and which was made by the United States in its (the Canal Company's) deed *to* the United States.

The judgment under review takes from the Canal Company a large portion of the water-powers thereby acquired, and the identical Kaukauna powers in question, as appears from the language of the reservation itself, to which attention has already been called. Assuming, for the argument, that this judgment of deprivation may stand, on the ground that these were public inalienable rights broader than lie within the scope of grant, and hence at least revocable, the question naturally arises as to the nature and extent of the obligation to the company, if any, which thereby is or may be imposed upon the United States.[1] Without pursuing the inquiry, it is apparant that the United States is directly interested in and affected by the judgment under review.

Unquestionably the United States is a necessary party to any suit affecting its rights under conveyances and contracts made by it, and is a necessary party to any suit affecting the inflow and discharge of waters from the government canal in its charge. Should the Secretary cause or permit the waters of the river to be wasted down the canal through the locks and waste weirs, would such action be a violation of the judgment under review? Would his decis-

[1] Speaking to an analogous question, the court of appeals of New York, in Coxe v. State, 144 N. Y. 407, say:

"It is quite conceivable, however, that such grants have been made under such circumstances, and for such purposes that 'when recalled or revoked, there may arise, in favor of the grantee and against the state, an obligation to restore the consideration paid, or to make good losses incurred in consequence of improvements or expenditures upon the faith of the grant, which the state is bound to discharge in honor and good faith.'" And further see cases cited page 410.

ion that such waste of waters was necessary to subserve public interests be subject to review by the state court? If he may do this, in any measure, may there not be surplus waters not needed for navigation which under the grant and reservation in question the Canal Company may use?

It appears that by virtue of the legislative grant made vicariously for the United States, the reservation of easement and arbitration proceedings, transactions made directly with the United States, the Canal Company has a title or right to property, claimed under the United States, or under a commission or authority exercised under the United States, and of which by the judgment under review it has been deprived. The state in its grant, and the United States officials in accepting the deed in question, each were exercising an authority under the United States, and the judgment in question, made in the exercise of an authority under the state and the United States, is against the title or right so acquired and claimed, and is in violation of the fourteenth amendment to the constitution of the United States. These claims of title or right were specially set up and claimed in the Canal Company's counter-claim.

The violated clauses of the constitution are not stated in the record, nor is it required that they be so stated. In the Kaukauna case the court say:

"This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court." (142 U. S. 254–269, and 1 Wall., op. 142.)

Nor could they be so stated, as the repugnancy to the constitution was first disclosed in the decision of the supreme court, directing entry of judgment in the superior court, and in the judgment so entered. The Canal Company could not have anticipated that the court would decide against the validity of the title or right so set up and

claimed under an authority exercised under the United States. In the case of Virginia v. Rives, say the court:

"Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly, until then he cannot affirm that it is denied or that he cannot enforce it in the judicial tribunals." (100 U. S. 313, op. 319; 96 U. S. 432, op. 441.)

It was in the supreme court that the federal question first arose, too late to incorporate a claim of repugnancy in the record, and too late to call attention thereto in the state court other than by the argument of counsel, and argument of counsel is held not to be a part of the record. (158 U. S., op. 183.)

The claim of counsel that the Canal Company's right to the easement in question depends upon the construction to be given to a state statute, and hence presents a state and not a federal question, appears to be fully met by a recent decision of this court. In Stanley v. Schwalby, the court say:

"Where the judgment of the highest court of a state against the validity of an authority set up under the United States necessarily involves the decision of a question of law, it is reviewable by this court on writ of error, whether that question depends upon the constitution, laws or treaties of the United States or upon the local law, or upon principles of general jurisprudence." (162 U. S. 255, op. 278–9.)[1]

It is submitted that federal questions arise in the case, and that the judgment is for review in this court.

2. THE LAWFULNESS AND EXTENT OF THE APPROPRIATION MADE BY THE UNITED STATES AND THE STATE ACTING FOR THE UNITED STATES AND THE USES TO WHICH THE APPROPRIATION MAY BE PUT. Or differently stated: (*a*) The right of the United States to divert the waters of the river for public uses, including that of navigation, is paramount to private right, and congress is the exclusive judge of the necessity for public use and of the extent of diversion or appropriation required. And (*b*) congress may put waters

[1] And see Scott v. McNeal, 154 U. S. 34, op. 45; Shively v. Bowlby, 152 U. S. 1, op. 44; Packard v. Bird, 137 U. S. 661, op. 669–70.

appropriated to public use not temporarily needed therefor to such private use as it shall deem right, and in the case at bar did determine to sell the right of use and apply the balance thereof to public use.

(a) *The right of the United States to divert the waters of the river for public uses, including that of navigation, is paramount to private right, and congress is the exclusive judge of the necessity for public use and of the extent of the diversion or appropriation required.*

Rivers of this country, say this court, constitute navigable waters of the United States within the meaning of the acts of congress, in contradistinction from the *navigable waters of the state*, where they form in their ordinary condition by themselves, or by uniting with other waters, a continual highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.[1] And over such waters the United States has control to the exclusion, if need be, of the state.

The paramount right of the United States to appropriate, and hence divert, the waters of the river in aid of navigation will, in a general way, be conceded; but the extent to which it may appropriate and has appropriated the waters, whether all the waters or less than all, is the contention here.

The right to make any use of these waters by diversion or otherwise which congress shall deem to be in aid of navigation is, we contend, a reserved right and extends to all and every part of the waters. Section 13 of the Ordinance of 1787 declares *the several articles* of the ordinance to be *a compact, unalterable*, "excepting by common consent" between the United States on the one part, and the people and states (thereafter to be formed) of the territory northwest of the Ohio on the other part. And *article* IV of the

[1] United States v. B., etc. Ferry Co., 21 Fed. Rep. 331, 109 U. S. 385, 12 How. 443, 107 U. S., op. 682–687; Willamet I. Bridge Co. v. Hatch, 19 Fed. Rep. 347, 144 N. Y. 408, 40 N. Y. Sup. 1088, 43 Wis. 262.

articles named provides that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, forever free, etc. This provision of the article was adopted pursuant to the act and deed of cession whereby the United States acquired jurisdiction over the territory in question, and whereby it assumed the obligation to maintain these waters as highways.[1] The same declaration was repeated in the congressional legislation of 1836 organizing the territory, and in 1846 lands were granted by congress to improve navigation; and in the enabling act providing for the admission of Wisconsin into the Union the declaration was again made, and it appears in the constitution itself with which she was admitted. Conceding that Wisconsin came into the Union with all the rights of the older states, and hampered no more than they by the Ordinance of 1787, nevertheless she remained obligated by the unalterable compact of article IV. She had changed her position in the compact, but still remained obligated as one of the United States; for the United States, all, were obligated, inasmuch as at the time of her admission into the Union there yet remained some portion of the original ceded territory not then admitted into statehood, and there had been no change of compact based on "common consent." It is true that the intention of congress as shown in this legislation is all for and in support of the compact, and not against it; and true that the provisions of the constitution disclose the same intention, and that these provisions are operative as fundamental law. But, nevertheless, back of all this lies the obligation of the compact, binding alike upon the United States, the state and the Northwest Territory.[2] The constitutional provisions together recognize or may constitute a reservation of right of control over the waters for public navigation. Whether the reservation be to the state itself or for the state and

[1] Scranton v. Wheeler, 6 C. C. A. 585; 57 Fed. Rep. 803–812.
[2] Scranton v. Wheeler, 6 C. C. A. 585; 57 Fed. Rep. 803–812.

United States, the right may be exercised by either.[1] And whether this case falls within this seeming reservation of power in the state constitution, or falls within the sovereign power of the commercial clause of the federal constitution, the necessary power exists and may be exercised by congress, and, so long as congress does not act, by the state itself.[2]

The exercise of this power, whether regarded as a reserved right or as a sovereign commercial right, does *not fall within the provision of the federal constitution requiring compensation.* And is so ruled by this court in cases recently reported. Say this court in the Gibson case, reported March 22, 1897:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states *and individual owners under them*, it is always subject to the servitude in respect to navigation created in favor of the federal government by the constitution. South Carolina v. Georgia, 93 U. S. 4; Shively v. Bowlby, 152 U. S. 1; Eldridge v. Trezevant, 160 U. S. 452." * * * (And quoting from Justice Strong, the court further says:) "If, as we have said, the United States have succeeded to the power and rights of the several states, so far as control over interstate and foreign commerce is concerned, this is not to be doubted."[3]

And in the Shively v. Bowlby case, reported March 5, 1894:

"Grants by congress (or U. S. patents) of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force no title or right below high-water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States."[4]

And say the circuit court of appeals in Scranton v. Wheeler, reported September 5, 1893:

"As an incident to *ownership* of lands *on the margins* of

[1] Same, p. 815.
[2] Same, pp. 812, 815.
[3] Gibson v. United States, 166 U. S. 269.
[4] Shively v. Bowlby, 152 U. S. 1, 26, 58; 57 Fed. Rep. 803.

navigable streams, the law of Michigan *attaches* the legal title to submerged lands under the stream," etc. * * * "But while the plaintiff, under the law of Michigan, is seized of the legal title to the soil under the waters, yet in the very nature of the property such seizure is of the bare technical title. The state of Michigan was a part of the Northwest Territory ceded by the state of Virginia to the United States for the public benefit." * * * (Here follows a reference to the ordinance of 1787 and the oft-quoted provision relating to navigable waters:) "These limitations on the powers of the Northwest Territory" * * * "ceased to have operative force upon the state of Michigan when admitted into the Union." * * * "When admitted," * * * "she entered on an equal footing with the original states." * * * "But this provision concerning her navigable streams was precisely the limitation under which all such streams were controlled by the older states," etc. * * * "It must from these constitutional principles follow that the state of Michigan held the soil under her navigable rivers under a high public trust, to preserve them free as public highways." * * * "The legal title which, under her law, becomes vested in such proprietors" (riparian owners) "*must be subject to the same public trusts*, and therefore subordinate to the rights of navigation, and subordinate to the powers of congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it." * * * "Here the plaintiff has sustained an injury which is wholly a consequence of the erection of a structure by congress in aid of the general and public right of navigation." * * * "*It is a case of damage without actionable injury.*" (The case is distinguished from Monongahela Navigation Co. v. United States, 148 U. S. 312.) * * * "*What is a proper exercise of this power of congress to aid navigation seems to be for congress to determine.*" * * * "If the title had remained in the state, the conclusion would be the same. The state would hold subject to the public use, and its property right in the submerged soil of a navigable stream would be subservient to the power of congress to regulate navigation; *and the use of such soil*," * * * "*would not have been the taking of private property of the state, within the meaning of the constitutional provision inhibiting it without compensation.*"[1]

[1] Scranton v. Wheeler, 6 C. C. A. 585 (57 Fed. Rep. 803, *811 to 815*); Gibson v. United States, 166 U. S. 269; Shively v. Bowlby, 152 U. S. 1, op. 33, 57, 58 (citing Withers v. Buckley, 20 How. 84—a case of the diversion of the waters of a river into a canal); Monongahela Navig. Co. v. United States,

And say the Wisconsin supreme court in the Arimond case:[1]

"Within these limits, that is, within the banks and below the ordinary high-water mark in the bed of the stream, the public may, for this purpose, *do as it pleases with the water*, and the damages resulting to the riparian proprietor are *damnum absque injuria*. It may change the current or flow of the water from one side of the stream to the other, or against one bank or the other; or may obstruct or impede the passage so as to check and slacken the flow and cause the water to set back; or, as has been done in some cases, *the water may be diverted or withdrawn entirely* from the original or natural bed, so as to make safer and more perfect navigation by *some new and artificial channel*. In short, the bed of the stream, with the water in it, is regarded by those cases precisely as if it were a belt or strip of dry land of equal length and width owned by the public. In that case the public might dig up the soil on one side and cast it upon the other side of the strip at its pleasure, without liability for injuries to the adjoining proprietors so long as no part of the soil itself was thrown or should fall upon their lands. The pit or excavation on one side with the pile of earth on the other, provided they were injurious to the adjoining proprietors, as they well might be, would be *damnum absque injuria*. The public might dig up and remove the whole soil to the depth and with the irregularities ordinarily found in the channel of a navigable stream or river, and the owners of adjacent lands could not complain."

This doctrine was thoroughly considered by the court before it was announced. It was given out in the earlier Lyons case, being therein stated to have been reached in the Arimond case, thus showing that the filing of the opinion, already prepared, had been delayed. And it has been announced by the same court in several cases since then, notably in the Eau Claire, Black River and Oconto River cases.

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148 U. S. 312 (op. 329, 333, 340); Willamette Bridge Co. v. Hatch, 125 U. S. 1; Bridge Co. v. United States, 105 U. S. 470, 102 U. S. 691; Gould on Waters, §§ 35, 40.

[1] Arimond v. Green Bay & M. C. Co., 31 Wis. 316, op. *338;* Wis. Impt. Co. v. Lyons, 30 Wis. 61, op. 65 — right to *make entirely new channel;* Commissioners of H. River v. Withers, 29 Miss. 21; The Falls Mfg. Co. v. Oconto R. I. Co., 87 Wis. 134, op. 149–152; Howe v. Weymouth, 148 Mass. 603, op. 606; People v. Canal Appraisers, 33 N. Y. 461.

In the Eau Claire cases,[1] relating to a dam in a navigable river in aid of city water-works, say the court (37 Wis. 435):

"In considering this motion we shall assume that the city possesses adequate power to establish *water-works.* * * * For that purpose the legislature could unquestionably grant and the city take power to construct and maintain a dam, not obstructing the navigation of a public river, or violating other right, public or private. And the dam so authorized might well produce an excess of power. *Superflua non nocent.* In such case, as was frankly admitted on the argument, the surplus need not run to waste. The legislature might well grant and the city take power to lease it. The power to construct and maintain the dam would still rest on the public municipal use, not on the disposition of the accidental excess. Spaulding v. Lowell, 23 Pick. 71."

And respecting the same dam (40 Wis. 543): "It was objected to the statute that it provides for no compensation for lands which *may be overflowed* by the dam. It is enough to say here that there is no averment in the information that any lands will be overflowed. The Chippewa where the dam is authorized is understood to be a peculiar river, and it is quite possible that there may be no overflow."

And in the Black River case,[2] where one of the channels of the river was closed against the riparian owner's contention (the same as here) that the waters should flow as they were wont to flow in a state of nature, and that he should have access to the navigable water, and where, after reviewing many cases, the doctrine is stated as follows:

"These cases and many others hold the doctrine that the waters in a navigable river or other navigable body of water are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such waterways are as much subject to the control of the state for the purposes of the improvement of such ways as a highway upon the land."

And in the recent Oconto case, decided in 1894, where the

[1] Attorney-General v. Eau Claire, 37 Wis. 435; Attorney-General v. Eau Claire, 40 Wis. 542, 543.

[2] Black River Imp. Co. v. The La Crosse Booming Co., 54 Wis. 659.

question is fully discussed in the light of decisions made by this court, the court say, by Cassoday, J. (head-note):[1]

"A stream which in its natural state is capable of floating logs to market during the spring freshets, which usually last about six weeks, is a public navigable water-way for the transportation of logs and timber, although during the remainder of the year it is not practically useful for such purpose without the aid of flooding dams.

"The legislature may authorize the construction of flooding dams in such a stream in *aid of navigation;* and the owners of *mill dams* built across the stream under *prior statutory authority* have *no right of action* for any impairment of the efficiency of their water-powers resulting from the proper use of such flooding dams."

(And in the opinion say): "The more serious question has at times been raised as to whether the legislature had power to authorize obstructions to such navigation in such streams, in view of the provision of our state constitution which declares, in effect, that 'the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.' Sec. 1, art. IX. * * * It is, however, unnecessary to determine that question here."

And this is the settled doctrine of the court except so far as impugned by the judgment under review.

And the fact that the water-powers are made available for use wholly *at the expense* of the United States (or the sovereign) is deemed to be an important consideration in reaching the determination that they *belong to the sovereign.*

"Another consideration (says Blodgett, J.)[2] which it seems to me is not to be overlooked in determining the control of admiralty over this water-way, is the fact that, although constructed by the state of Illinois, *the cost was largely defrayed by an appropriation of the public lands of the United States, thus giving it, both by the ordinance and the means from which it was built, the character of a national thoroughfare.*"

And this consideration is deemed important even *in cases of eminent domain.*

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[1] Manufacturing Co. v. Oconto River Imp. Co., 87 Wis. 134.

[2] The B. & C., 18 Fed. Rep. 543, 544; The City of Lowell, 23 Pick. 71–80; Dingley v. City of Boston, 100 Mass. 544.

In the Dingley-Boston case,[1] for the abatement of a nuisance by the filling up and consequent reclamation of submerged lands, the question arose as to whether only such interest in the lands as was required in order to abate the nuisance must be taken, or whether it was competent to take the full fee not so required. And the court held that inasmuch as the great expense to be incurred by the city would otherwise inure to the benefit of the riparian proprietor, the full fee could be taken and the avails applied to the expense incurred.

And to like effect, cases therein cited, notably the case of Chase v. Manufacturing Co.,[2] wherein a right granted to a canal company was held to remain after the canal had ceased to exist, and to be transferable to other parties, to be used as fully as if it were held in fee simple.

And further, also, a Massachusetts case, Newton v. Perry.[3] Say the court:

"Whatever rights over the land could be needed for the protection of the water supply under any circumstances, the plaintiff has got. It would be an unjust refinement to say that the right is *only to do such things from time to time as a court or jury may think necessary then.* The whole right is paid for without regard to the probability of its being exercised. We are of opinion that when land is taken for the protection of a water supply, exclusive possession of the surface is or may be necessary in order to get the protection needed, and therefore that the right to such possession is one of the rights taken."

And this consideration was deemed important by this court in the Kaukauna case.[4] Say this court:

"There was every reason why a water-power thus created should belong to the public rather than the riparian owner."
* * *

If any such water-power were incidentally created by the erection of a dam, it was obviously intended that it should belong to the public and be used for their benefit, and not for the emolument of a private riparian proprietor.

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[1] Dingley v. City of Boston, 100 Mass. 544.
[2] Chase v. Manufacturing Co., 4 Cush. 152.
[3] Newton v. Perry, 163 Mass. 321.
[4] The Kaukauna Case, 142 U. S., op. 273, 282.

Did, then, the appropriation made by or for the United States cover *all the waters of the river or less than all?* In considering this question it is necessary to take notice of the claims of opposing counsel, to the effect, as we understand them, that under the rule adopted in this state,— not the "true rule" of Barney v. Keokuk,[1] — riparian ownership has been extended so as to cover in the ownership of beds of navigable rivers to the thread of the stream, and that the diversion of water therefrom cannot be made excepting in the exercise of eminent domain on making compensation; and then only can be diverted or taken so much water as shall actually be used in the activities of navigation, *i. e.*, only so much as in the sense of actual use is needed for public use.

On these propositions stand this contention,— affecting herein the waters pertaining to the *south half* of the river, the question as affecting the north half not having been raised by the pleadings. It is a contention between the riparian owner and the United States, and one in form only with the Canal Company; for the latter's rights, as respecting this contention,— namely, the *south half* of the river,— exist only through the United States or the state acting for the United States. If the United States, or the state so acting, did not appropriate these powers, the Canal Company does not have them.[2] For the purposes of this suit it is the *United States*, which, through its grantee of an easement, while asserting the right to use for power *all*, is in fact using part of the waters of the river, and discharging them from the so-called canal into the North channel.

Treated, then, as a contention between the United States and the riparian owner, we make answer to the proposition that the rule of the state gives to the riparian owner a more extended ownership than the "true rule" of the federal court, by contending that the state rule *cannot apply to the* Fox river, nor to the Wisconsin below the Portage, for the rea-

[1] 94 U. S., op. 337–38.
[2] Kaukauna Case, 142 U. S., op. 278.

son that these rivers, while yet under the territorial and hence the federal rule as to riparian ownership, were by express legislation brought under the control of congress as constituting, one with the other, an interstate highway, and hence were "navigable waters of the United States," as distinguished from "navigable waters of the state," and therefore beyond the reach of the state rule, and they were declared to be such highway in the constitution of the state itself. And *were the state rule to apply*, then that the waters and beds of navigable streams, even though title to the beds be in the riparian owner, alike are subject to the paramount sovereign right of the government to use them as it shall be advised for all public purposes, including navigation. And this we understand to have been ruled in the Gibson case,[1] and the later St. Paul Water Works case.[2]

And to the proposition that the government cannot divert the waters of the river to the injury of the riparian owner, excepting in the exercise of eminent domain on making compensation, we answer that such is not the rule of the cases cited, either of the state — the Black River and other cases — or of the United States — the Gibson and other cases: That in diverting waters the government is using its own in the exercise of a sovereign right, and in so using, in no respect impinges upon any right of the riparian owner, whatever rule of riparian ownership be applied; nor were it an exercise of EMINENT DOMAIN *between private parties*, would it in any respect impinge upon the riparian right, for no part of the submerged lands or real estate to which the riparian owner makes claim of title is taken, and damages for injuries to lands not taken cannot be recovered.[3] But the better, the true answer, is, and we think it to be the holding of

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[1] Gibson v. United States, 166 U. S. 269.

[2] St. Anthony Falls W. P. Co. v. Board, etc., of St. Paul, 58 N. W. Rep. 335, and in this court unreported.

[3] Hanlin v. Railway Co., 61 Wis. 515; Johnson v. Railway Co., 80 Wis. 641, 68 Wis. 180.

the Gibson case, that the United States cannot exercise its sovereign rights in one state differently from its exercise of them in another. It cannot make compensation to riparian owners in one state and refuse it in another. "The title to the shore and submerged soil," whether in the respective states *or in individual owners under them*, "is always subject to the servitude in respect of navigation created in favor of the federal government by the constitution."

And to the proposition that the government can only appropriate so much of the water as shall actually be used in the activities of navigation, we again refer to the Gibson and to the Kaukauna cases. It is for the sovereign, for congress or the legislature, to say how much shall be appropriated. It is a legislative and not a judicial question. Says the Massachusetts court, speaking to a case of eminent domain where the private right is not burdened with a public servitude: "It would be an unjust refinement to say that the right is *only to do such things from time to time as a court or jury may think necessary then.*"[1] And we ask, were congress hampered by such limitations, would it not effectually militate against the success of the great schemes of internal improvement now in its charge? And especially we ask, can these hampering limitations be put upon congress by a state court in a collateral proceeding to which the United States is not a party, and by means of which an obligation, were it only moral, be raised against the United States?

And in passing, as respects the further claim of opposing counsel, viz., that certain action taken by the Canal Company respecting powers on the river other than those in controversy be not consistent with the claim of title here asserted, we answer that the Canal Company and its immediate grantor have, as was claimed by them, held title to the water-powers on the river for more than forty years, during much of

[1] Newton v. Henry, 163 Mass. 321.

which time there was no market demand therefor, and it is not impossible that in that length of time their action and claims may not at all times have been consistent. The Canal Company may have estopped itself in some measure respecting the use and possibly the ownership of certain powers, but surely it cannot have forfeited its title to powers in relation to which it has not acted, and hence cannot be estopped from making claim to the powers in controversy here.

It follows, we contend, that it was competent for congress, without making compensation, to *appropriate all* of the waters of the river. And had the waters been private property and not, as in fact, public property under the control of the United States, to have *seized all* in eminent domain on making compensation. *What then was its intention?*

The board of public works act, section 16, declares that

"When any land, waters or materials appropriated by the board to the use of said improvements shall belong to the state, such lands, waters or materials, and so much of the adjoining land as may be available for hydraulic or commercial purposes, shall be absolutely reserved to the state, and *whenever a water-power shall be created by reason of any dam erected or other improvements made on any of such rivers, such water-power shall belong to the state, subject to future action of the legislature.*"[1] This is a declaration by the state (for the United States) of the extent of its appropriation of waters, and is an appropriation as distinguished from a seizure in eminent domain, and hence is in sharp contrast with sections 16 and 17, directing a *seizure* of "lands, waters and materials," and the making of compensation therefor. It is an assertion of ownership and right of control and covers *all water-powers so created.*

Say the state court in the Kaukauna case,[2] speaking to a narrow construction of this section:

"We cannot adopt this construction. The statute abso-

[1] Appendix, p. vii; C. C. Doc., p. 16.
[2] Kaukauna Case, 70 Wis., op. 650.

lutely reserves to the state the property belonging to it mentioned in the first clause, and at the same time confers upon the state the water-power therein mentioned; that is to say, such water-power as should thereafter be created 'by reason of any dam erected or other improvements made on any of said rivers' (including the Fox river) which otherwise did not belong to the state. This was necessary in order to give the state the absolute control of the improvement, and such is the plain reading of the statute."

By amendments in 1850 the reservation was extended "to any *water-power* created by the construction of the canal or improvement of the Fox and Wisconsin rivers, and so much land adjoining the same as the board of public works may deem necessary to form a part of said water-power;" *and the board was authorized to sell and apply the proceeds of sale of said powers to the work of improvement*, and to sell even when the state did not own all the land on which the dam abutted.[1] This act of 1848 was passed before any plan of improvement had been suggested and is to be construed independently of the plan afterwards adopted.

The language of the section covers any water-power created by "reason of any dam or other improvements" and "any water-power created by the construction of the canal or improvement," and clearly covers all water-powers created in any way by the work of improvement.

It was competent, perhaps would have been better, to have adopted a plan to overcome the rapids at Kaukauna by a series of dams one above another, each extending across the river, with locks between, instead of the artificial channel at the side. Had this been done, there would be no question as to riparian rights, or as to the Canal Company's ownership, for the water-powers created by all of the dams like the present Kaukauna dam would, under the Kaukauna cases, be vested in "*absolute ownership of the whole thereof*" in the Canal Company. The only compensation to be made

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[1] Appendix, pp. iv, v, viii and ix; C. C. Doc., pp. 26, 28 and 37; chs. 275, 277 and 283, Laws 1850, and ch. 464, Laws 1852.

in eminent domain would be for *lands taken* for dams and locks and by flowage. The Canal Company would own all of the power created by the dams and the defendants be enjoined from tapping the ponds above them. There would then be no question as to the scope of section 16 making the appropriation, and of its covering the powers. To now limit its scope by the kind and plan of improvement subsequently adopted would appear to be unreasonable, for clearly it covers all water-powers created or *that may be created* in any way by the work of improvement.

The land grant act of 1846, providing that such plan of improvement should be adopted as the legislature should "*from time to time determine* for the best interests of the state," clearly contemplated that the plan would be enlarged from time to time. And enlargements were made. An enlargement of the plan originally adopted was recognized and approved by section 2 of the act of 1853, incorporating the Fox and Wisconsin rivers improvement,[1] and a further enlargement by section 1 of the act of 1856, providing for the deed of trust,[2] and later still others were authorized;[3] while in 1874 the government undertook the most radical enlargement of all, and already since then has expended thereon over $3,250,000, and more is required, while other enlargements are sure to follow.[4] With these in contemplation from the beginning, can it yet be said that the plans of improvement did not contemplate the use of all of the river?

The record shows that owing to limited experience and the crude state of hydraulic knowledge then prevailing, the plan adopted was supposed to be sufficiently large to pass all of the water of the river, and as now constructed and enlarged

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[1] Appendix, p. xii; C. C. Doc., p. 40.
[2] Appendix, p. xix; C. C. Doc., p. 46*a*.
[3] Appendix, pp. xxvii, xxxv–xxxvi; C. C. Doc., p. 57, p. 18, ch. 572, Laws 1866; C. C. Doc., p. 59, ch. 360, Laws 1867; C. C. Doc., p. 59, ch. 104, Laws 1869.
[4] Wisconsin v. Duluth, 96 U. S. 379.

is or soon may be sufficiently large therefor, thus giving visual notice of the appropriation. (Pr. Rec., pp. 509–10.)

In support of the claim that it was early and ever thereafter continuously understood that all of the water-powers to be created by the work of improvement and its enlargements had been in fact appropriated and subsequently sold to the company succeeding the state, excerpts from documents covering twenty or more pages of the printed record, pages 466 to 486, were, under objection, read to the court. These were divisible into classes: excerpts from reports of legislative committees;[1] excerpts from the reports of the board of public works;[2] prospectuses issued when putting loans on the market;[3] excerpts from the reports of the engineers of the companies;[4] and excerpts from reports of the companies.[5] All of these reports related to the Fox and Wisconsin rivers improvement, and presumably the references are to such powers as were supposed to be incidental thereto. Illustrations are given in the notes;[6] all showing, as we con-

[1] Printed Record, pp. 466–474.
[2] Printed Record, pp. 474–486.
[3] Printed Record, pp. 474–477.
[4] Printed Record, pp. 477–486.
[5] Printed Record, pp. 482–486.

[6] Reports of legislative committees, January 1, 1853 (Rec., p. 466): That "we have no means of ascertaining the quantity of water discharged, but it is believed to furnish at the different points along the rapids the most extensive hydraulic power to be found within the same compass in any part of the United States." And March 31, 1856: "Your committee are unable to estimate these sources of income, but referring to the exhibit of the company they find them appraised as follows: Estimated value of hydraulic power, $300,000."

Reports of board of public works, January 21, 1850 (Rec., p. 468): "Had the control and disposition of these water-powers been placed in the hands of the board, some advantage would have accrued to the state, in the way of obtaining more favorable propositions for the improvement." * * * "At the Grand Chute, Theodore Conkey proposed for the construction on that side of the river of section No. 1, lock No. 4, and the dam, for the aggregate sum of $11,917.25, and the right to all the surplus water for hydraulic purposes." * * * "Overtures were made to the board by the agent of some eastern capitalists, for making the improvement at the Little Chute and the Grand Kaukauna, the only portions of the work not under contract. The conditions under which they proposed to do the work were: *The privilege of using all the surplus water for hydraulic purposes*, and also the right of collecting tolls under the direction of the state authorities."

Prospectuses accompanying issue of bonds, August 1, 1853 (Rec., p. 474): "The water-powers incidentally created by the construction of this improvement will eventually prove to be one of its most productive sources of revenue, and of themselves sufficient to yield a fair percentage upon the

tend, that it was understood at the time and thereafter that the appropriation covered all of the powers created.

There are no qualifying words in the appropriation section whereby the court may be enabled to limit its scope. Appellants' counsel fail to suggest any guides or lines by which the court may be led to a wise and reasonable limitation; nor can we suggest any. On the contrary, the courts hold there can be no limitation in the nature of things. Says the Wisconsin court, speaking with reference to the use of all the waters at the Kaukauna dam: "*This was neces-*

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total cost of the works. The nine dams and the *six miles of canal along which it is only necessary to erect bulk-heads* to make the powers available, will afford water sufficient to drive a large number of mills and factories, the volume discharged through the Fox river being equal to a stream 200 yards in width, 2 feet in depth, with a velocity of 8 miles per hour." * * * "It is, therefore, a moderate estimate to value the whole hydraulic power furnished by the improvement at $300,000."

Reports of engineers of company, November 14, 1853 (Rec. 477):

"The extent of the water-power on the lower Fox may be judged of from the fall of 170 feet to its water, as well as from the fact that for the lockage of the improvement itself (at its present capacity) not more than one-tenth part of its water could be used. The balance can all be devoted for the purposes of hydraulic power."

Reports of engineers of company, December 1, 1854 (Rec. 478):

"The magnitude of the water-power on the lower Fox may be calculated from the fall of the stream, which is 170 feet, and the minimum supply of its water, which we have seen is 129,236 cubic feet per minute. With no other allowance than five per cent. for the possible extent of its lockage, we should have (139,236–139, 236–20 x 62, 33 x 170, 33,000) 42,471 horse-power." * * * "From this data the whole value of the water-power on the lower Fox may be roughly estimated at $500,000."

Reports of companies, December, 1856 (Rec. 478-479):

"With a minimum volume of 1,041,540 gallons per minute, the extent of the power of the river may be feebly imagined. The improvement company heretofore have dammed the river at or near the head of each of the rapids, and constructed canals leading into the still water below. Thus with the completion of the improvement, a water-power, stretching along the river a distance of thirty miles, with dams and *canals ready for use*, is furnished, requiring but the erection of mills and machinery to convert the banks of the Fox, from the Menasha to Depere, into one continuous line of factories and work-shops." * * * "On the lower Fox river there is a fall from Lake Winnebago to Green Bay of about 170 feet, and this fall is made available for hydraulic purposes by the dams which had been constructed around the rapids on the river.

At Depere	8 feet.
" Little Kaukauna	8 "
" Rapid Croche	8 "
" Grand Kaukauna	50 "
" Little Chute	38 "
" Cedars	10 "
" Grand Chute	38 "
" Winnebago Rapids	10 "
Total	170 "

* * * "I will assume that, after supplying the locks and canals and providing for the leakage of the dams, that there is 100,000 cubic feet per

sary in order to give the state control of the improvement;"[1] and the federal court, in the same reference: "*There is every reason why a water-power thus created should belong to the public rather than the riparian owners.*"[2] And again in the Shively case: * * * "That reason being that the public authorities ought to have *entire control* of the great passage-ways of commerce and navigation to be exercised for the public advantage and convenience."[3] And these views are supported by a line of authorities, *infra*, relating to *eminent domain*, and particularly the condemnation of ponds for water supply, in which the courts hold that compensation must cover damages past, present and future or prospective; or, in effect, that all of the waters must be taken, as there cannot be successive condemnations for different portions of water.

And now referring to the facts more fully given in the statement of facts herein, to the effect that whenever a water-power was created by the works of improvement the same should be sold and proceeds be applied to the works, and especially that the trust deed foreclosure proceedings and *decree of sale* describe the water-powers sold as being "all of the water-powers created by and upon the line, or connected with the works of the Fox and Wisconsin improvements, so-called," and that the reservation in the deed to the United States describe them as being, viz.:

"The water-powers created by the dams and by the use of the surplus water not required for the purposes of navi-

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minute available for hydraulic purposes. Multiplying 100,000 by 62½ (pounds to a cubic foot of water), and dividing by 33,000, gives 189 4-10 horse-power for each foot fall. This will make the power at each point, viz.:

Little Kaukauna	189.4 by	8	feet	equal	1,515 H. P.
Rapids Croche	189.4 "	8	"	"	1,515 "
Grand Kaukauna	189.4 "	50	"	"	9,470 "
Little Chute	189.4 "	38	"	"	7,197 "
Cedars	189.4 "	10	"	"	1,894 "
Grand Chute	189.4 "	38	"	"	7,197 "
Total					28,788 "

* * * "He then gives a statement of assets, liabilities and wants of the company, in which he places the value of the water-power at $500,000." The reports for 1857, 1859 and 1862 are much the same.

[1] Canal Co. v. Kaukauna W. P. Co., 70 Wis. 635.

[2] Canal Co. v. K. W. P. Co., 142 U. S. 254.

[3] Shively v. Bowlby, 152 U. S. 1-43; Gibson v. United States, 166 U. S. 269

gation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same;" * * * "and subject to all leases," * * * "the said leases being also reserved;" * * * and it appearing that the powers in controversy here were to some extent under lease and thereby referred to, and the deed having been accepted and retained and in effect ratified by congress, thus interpreting its own act of appropriation, and the reservation having the legal effect of a deed from the United States, that is, the United States having sold to the company all the surplus water, it is submitted that all of the waters of the river were in fact appropriated by or for the United States and in the exercise of a reserved right, or if not, then of a sovereign right for which, in either case, the making of compensation is not required.[1]

And of the extent of appropriation also congress is *the exclusive judge*, and when congress does not act the state is the judge. Speaking of obstructions placed in navigable waters, this court, in the Gibson case, say that it is for congress to determine what shall or shall not be deemed an obstruction *in the judgment of law*. Say the court: "Upon this subject the case of Pennsylvania v. The Wheeling & Belmont Bridge Co., 18 How. 421, is instructive. There it was ruled that the power of congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation. * * * The case of the Clinton Bridge, 10 Wall. 454, is in full accord with this decision. It asserts plainly the power of congress to declare what is and what is not an illegal obstruction in a navigable stream." And quoting from a prior opinion, say: And "if, as we have said, the United States have succeeded to the power and rights of the several states so far as control over interstate and foreign commerce is concerned, *this is not to be doubted.*"[2]

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[1] Black River Imp. Co. v. La Crosse B. & T. Co., 54 Wis. 659; Hollister v. Union Co., 9 Conn. 435; Monongahela Nav. Co. v. Commissioners, 6 Watts & Serg. 101, etc., etc.; Minneapolis Mill Co. v. St. Paul, *58 N. W. 33;* 16 Am. Enc. of Law, p. 264, subd. V. (7), and cases cited; 16 Am. Enc. of Law, p. 265, subd. V., note 1, and cases cited.

[2] Gibson v. United States, 166 U. S. 269.

And in Wisconsin v. Duluth, followed by the state court, this court, in effect, say:

"There exists no right in any other branch of the government to forbid the work or to prescribe the manner in which it shall be conducted." [1]

And in Scranton v. Wheeler the circuit court of appeals say:

"What is a proper exercise of the power of congress to aid in navigation seems to be for congress to determine." [2]

And, speaking of seizure in *eminent domain*, this court say:

"The legislature may determine what private property is needed for public purposes — that is a question of a *political and legislative* character; but when the taking has been ordered, then the question of compensation is *judicial*." [3]

And the reason for this is given in the Kaukauna cases and the Shively-Bowlby case:

"That reason being that the public authorities ought to have *entire control* of the great passage-ways of commerce and navigation, to be exercised for the public advantage and convenience." [4]

That congress is the exclusive judge of the extent of its appropriations seems to be conclusively settled, and that the courts may investigate the intended scope of such appropriations is equally clear, but may not fail to give effect to that intention when ascertained, at least short of *bad faith* on the part of congress. It will not be presumed that congress or the legislature of the state will act in disregard of the high responsibilities resting upon them and of their duties to the public.

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[1] Wisconsin Water Co. v. Winans, 85 Wis. 26, op. 39; Wisconsin v. Duluth, 96 U. S. 379, op. 383, as to public works for which appropriations are made in the river and harbor bill; and page 387, as to the far-reaching importance of works apparently local in character, say the court: "If that body (congress) sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this court decree that it must forever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?" etc.

[2] Scranton v. Wheeler, 6 C. C. A. 585, 57 Fed. Rep. 803, 814; Penn. v. W. I. B. Bridge Co., 18 How. 421.

[3] Monongahela Navigation Co. v. United States, 148 U. S. 312, op. 327.

[4] 142 U. S. 254, 152 U. S. 1–43, 70 Wis. 635. 650.

The record shows that the appropriation here made was made wholly by the United States or by the state. The entire work with its enlargements was all constructed under such authority and pursuant to plans so adopted. So far as the company grantees of the state acted therein, they so acted in obedience to the *requirements* of state legislation, following plans theretofore adopted by the state for the United States. The controversy is over the extent of the appropriation, and hence is exclusively between the government and the riparian owners. How far they may review the acts of the government in the exercise of public rights is the question presented. The Canal Company's standing here is that of the grantee of the United States and of the state acting for the United States.

(b) *Congress may put waters appropriated to public use not temporarily needed therefor to such private use as it shall deem right; and in this case the determination was to sell the right of use and apply the proceeds thereof to public use.*

It is no longer an open question that in appropriating waters in aid of navigation, congress may appropriate surplus waters not presently needed for navigation and may make temporary use of the same for private purposes, and may sell or lease such use,[1] and that in this case congress, in effect, has sold such temporary use of all appropriated surplus waters not needed for navigation to the Canal Company, and the Canal Company now owns such right of use, the only controversy being whether the appropriation was in fact of all the waters of the river or less than all,[2] and if

[1] Green Bay & Miss. Canal Co. v. Kaukauna Water Power Co., 70 Wis. 635; G. B. & M. C. Co. v. Kaukauna W. P. Co., 142 U. S. 254; Attorney General v. Eau Claire, 37 Wis. 400; Fox v. Cincinnati, 104 U. S. 783.

[2] This may be inaccurate if the suggestion be entitled to consideration that the company did not reserve all of the water-powers in its deed to the United States, but left part of them in the United States. The award of the arbitrators and the reservation in the deed covered all of the surplus water. Congress itself ratified the deed by making the appropriation for the balance due the company. Col. Houston, a soldier and not a lawyer, after the award was made, scanning the testimony so far as preserved, erroneously

all, then the full right of use of all surplus belongs to the company. It paid full market value for the same at the public foreclosure sale, and again when the work was turned over to the government pursuant to arbitration. In both instances the avails went in aid of navigation.

3. THE EXTENT TO WHICH THESE MATTERS HAVE ALREADY BEEN DETERMINED BY THIS COURT.

Our contention is, *that the water-power created by the Kaukauna dam belongs to the Canal Company and may be used at least at any point on the dam. The dam consists of the entire structure which upholds the pond, and extends from the Hunt enbankment on the south side to the first lock on the north side, both inclusive.* And this, we contend, is the holding in the Kaukauna cases.

To determine this matter it is necessary to refer to the judgment under review in order to ascertain the effect which is there given to these cases, both of which are cited approvingly, and hence according to the intention of that court, as we must infer, followed. The judgment under review approves the judgment entered in the superior court pursuant to its mandate and holds that it is a substantial compliance with the mandate issued. Say the court by Cassoday, C. J. (Pr. Rec., p. 580):

"*After careful consideration we are constrained to hold that the judgment is a substantial compliance with the mandate of this court;*" and further the court say (Pr. Rec., p. 579):

"Counsel for the appellant contend that the judgment is not in exact accordance with the two opinions of this court, and hence not in exact accordance with the mandate. We perceive no inconsistency in the two opinions; but if there is any, the one on the motion for re-argument, being last,

concluded that the quantities he states were the measure of power which he suggested should be left with the company; whereas it was in fact the measure of power which it was thought by witnesses could be utilized on lands then owned by the company. What had it to do with the matter in hand whether the company had lands sufficient on which to utilize all of the power or not, for lands could be procured. But the suggestion of Col. Houston was not heeded, and the deed in the form shown in proof was accepted, and on such acceptance congress made its appropriation.

would prevail." * * * "The limit to its (the Canal Company's) right is at the point where it infringes upon the rights of others. It concedes to it all the rights which the state had or could acquire as against such lower owners. The place where it may use the water for power is restricted only by its duty to refrain from injuring others." * * * "Certainly we did something more than determine that the Canal Company was not entitled to the whole water of the river, as contended by counsel; so it is very obvious that counsel is in error in claiming that the right of the Canal Company to draw water through the canal as riparian proprietor had not been considered by this court."

The judgment of the superior court, thus approved, ADJUDGES:

"*First.* * * * That all of the water of the river, except that required for the purposes of navigation" (estimated by Newman, J., at 1-100 of the flow) * * * "shall be and is hereby divided and apportioned between and to the South, Middle and North channels of the river," etc., etc., * * * "*and each of the parties to this action*" (including the Canal Company) "are *forever* enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid." * * *

"*Second.* * * * That the water-power * * * is due to the gravity of the water as it falls from the crest to the foot of the dam * * * and not to the use of the water * * * through said canal, and that neither said state * * * nor said * * * Canal Company * * * ever acquired or owned any water-power upon, etc. * * * by reason of or as incidental to the construction and use of said canal for navigation;" and

"*Third.* * * * That said * * * Canal Company * * * shall so use the water-power, *if at all*, created by said dam as that *all the water used for water-power * * * shall be returned to the stream in such a manner and at such a place as not to deprive the appellants * * * of its use as it had been accustomed to flow past their banks, and that it shall flow past the lands of said appellants * * * and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants have the right to use the water of said river * * * as it was wont to run in a state of nature without material alteration or diminution.*" (Pr. Rec., p. 554.)

This judgment of the superior court more accurately determines the effect, although possibly not the intention,

of the supreme court judgment than the four conflicting opinions, as we regard them, on which it is based. It adjudges that "*all of the water of the river*," except that required for the mere lockages of navigation, shall be apportioned to the three channels in the proportions stated, and that the Canal Company shall use the water-power created by the dam, IF AT ALL, so that all the water used be returned to the stream in such manner and place as not to deprive the riparian owners of its use as it had been accustomed to flow past their banks in a state of nature without material alteration or diminution. It appearing from the record that the riparian ownership of the South bank of the river from a point above the foot of the cross-dam down stream to a point far below the head of Island No. 3 is in the Water Power Company, this adjudication prohibits the Canal Company from using the power of the river, not only from the dam extension or canal, *but also from and at the cross-dam.* An inspection of the maps hows that *it would be impossible to use the water at the dam* — to carry it in the least beyond the crest of the dam — without at once diverting it in some measure from the south bank, where, in a state of nature, it was accustomed to flow. The judgment absolutely annuls and destroys, as we contend, the rights adjudged to the Canal Company in the Kaukauna cases.

In those cases, federal and state, it was held that the water-power created by the dam belonged to the Canal Company. Say the state court, and to the same effect this court:

"*We conclude, therefore, that whatever rights the state took to the Kaukauna water-power by the act of 1848 (which is the absolute ownership of the whole thereof, if that is a valid act) is vested in the plaintiff*" *Canal Company;* and in the later case of Kimberly v. Hewitt, relating to an improvement dam higher up on the stream, say:

"Having held that the Canal Company owns the surplus water-power created by the improvement, we must hold that it owned the surplus water-power in question, and that

it has effectually conveyed it to the plaintiff, as it lawfully might."[1]

The appropriation having been made wholly by the United States, or the state acting for the United States, and in no part whatever by either of the grantee companies of the state, in holding that the superior court judgment annulling rights given to the Canal Company as stated, nevertheless "*concedes to it all the rights which the state had or could acquire as against such lower owners,*" necessarily and irreconcilably conflicts, we submit, with the law laid down by this court in the Kaukauna and other cases.

Newman, Justice (Pr. Rec., p. 545), after quoting from the opinion of this court in the Kaukauna case as follows:

"So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal and was not a *colorable device* for creating a water-power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created," *adds:* "But it is not the dam itself of which complaint is made. It is claimed (p. 545) that the dam is unlawfully used as a *colorable device* for the purpose of *creating a water-power at a point* at some distance removed from the dam. It is evident that the water-power which was created incidentally by the erection of the dam is due to the gravity of the water as it falls from the crest to the foot of the dam. What further power it may have in its present distribution is not incidental to the erection of the dam, *but such as has been added to it from deliberate design.* The first reach of the canal to the first lock did not create a water-power. No power existed there until the bank of the canal *was cut for the very purpose of creating it.* Until then all the water of the stream not required for navigation passed over the dam. There it created a power which was in a true sense incidental to the erection of the dam. The power created *by the cutting of the canal* was not incidental to the erection of the dam, or to the construction and use of the canal for navigation, but was *ex industria* for the purpose of creating a water-power. It was created for its own sake and not incidentally. So far from being an incident to the lawful public improvement, it is in derogation of the public improvement. It impedes rather than aids the navigation of the stream."

[1] 79 Wis., op. 338.

On the same state of facts which led this court in the Kaukauna case to hold that the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal *and was not a colorable device* for creating a water-power,[a] the Wisconsin court holds that the extension down stream of the same structure, and, as we contend, a part of the same dam, and in any event the connecting work of improvement appropriated, planned and constructed at the same time, and with it as parts of the same public work, *and all by the United States, or the state*, was, when used for water-power, a *mere colorable device for depriving the opposite riparian owner of his power.* "The dam," says the opinion, "*is unlawfully used as a colorable device for the purpose of creating water-power at a point at some distance removed from the dam.*" Assuming to follow the opinion of this court, it yet disregards the adjudication of this court; for we contend that the extension down stream is a part of the dam, and if so, is in express terms covered by the decision, and if only a connecting work of improvement, part with it of the public work, is equally within the spirit of the decision.[1]

To reach this conclusion the court goes by the way of other conclusions even more extraordinary, as we deem them. Say the court:

"The first reach of the canal to the first lock *did not create a water-power. No power existed there* until the bank of the canal was cut *for the very purpose of creating it.* * * * It was created for its own sake, and not *incidentally.* So far from being an incident to the lawful public improvement, it is in derogation of the public improvement."

These two propositions, that cutting the bank created power, and that the power howsoever created is not incidental to the improvement, we conceive to be unmistakably erroneous. That the proposition that cutting the bank creates water-power *is erroneous* seems to be clear. The

[1] Dupasseur v. Rochereau, 21 Wall. 130–134; Crescent City Live Stock Co. v. Slaughter House Co., 120 U. S. 141; Sharpe v. Doyle, 102 U. S. 686, 143 U. S. 371–390, 146 U. S. 60–66, 161 U. S. 185.

(a) Kaukauna case 167 U.S. op. pp 267-269:

bank is cut not to create power, but to utilize power already created, *as otherwise every flume creates power;* whereas it is understood to be a mere means for using power. Chief Justice Gibson defines water-power (McCalmont v. Whitaker, 3 Rawle, 90) as follows:

"The water-power to which a riparian owner is entitled *consists of the fall in the stream* when in its natural state, as it passes through his land or along the boundary of it; or, *in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it.* This natural power is as much the subject of property as is the land itself."

And this definition is followed in Borard v. Christy, 14 Pa. St. 267; and by Woodward, J., in Brown v. Bush, 45 Pa. St. 61; and in Angell on Water Courses (6 Perkins' ed.), sec. 95 and note, and secs. 144–5 and (7th ed.) secs. 95–95*a*, 144–5, citing many cases, and in other works on waters. And see the Century Dictionary, title "Water Power."

It is the act of bringing a body of water to a place where it can be discharged to a lower level than its own that creates water-power. All this was accomplished by the fall in the stream and the construction of the dam, canal and embankments — there being a fall in the stream of about nine feet above the cross-dam and of about eleven feet from the foot of the cross-dam to the first lock. It is the dam and canal or dam extension structure together with the fall in the stream which creates water-power. The openings in the canal bank are the means by which the power is utilized, and are not the means by which it is created. If there had been no fall in the stream, and no difference in level between the water in the canal and the water in the stream below, cutting the bank would not have created the water-power. Something more was required.

That the proposition that the power, howsoever created, is not incidental to the work of improvement is erroneous, is, we think, equally clear. The dam and entire canal structure were part of one plan or system of works *designed and adopted by the state through its board of public works;* were builded together one with the *other by the state* (*and its successors*) for the purpose of making a single work of improve-

ment, the object of which was primarily an improved channel for navigation, and secondarily, or incidentally, the creation of water-power, both of which, the channel and water-power, should belong to the state (and its successors), and from each of which it should derive a revenue — tolls from the channel for navigation and water rent from water-power. The fact seems to be overlooked that although the water channel came immediately into use for navigation, it was years before any part of the water-power created by the dam and other work of improvement came into use, and that as yet a large portion of it is unused. The fact, foreseen from the beginning, that the water-power would long remain unused (as the early engineer, Westbrook, said, "Any estimate of the water-powers would be more curious than useful"), itself would indicate that water-power was the secondary or incidental object, and navigation the primary object. The fall of the river was such that, without a waste of trust funds, the canal could not have been built in any way other than that in which it was builded. Locks of less than ten feet lift would have made needless obstacles to navigation. Both dam and canal as constructed were constructed together, according to the plans adopted, to aid navigation and were necessary for navigation, and when completed went into immediate use therefor and have so remained in use ever since; while for water-power purposes they did not go into use for years, and as yet are not in full use. Both objects are secured by the work of improvement, and both were contemplated in the legislation authorizing it. A riparian owner having title to the banks of a navigable stream may, with legislative permission, lawfully build therein a dam to create power for the private purpose of manufacturing, but not so the sovereign. For, although the sovereign may have acquired by purchase or otherwise the title to the banks, he may not expend the public moneys in the construction of dams to create power for manufacturing or for any private purpose. The sovereign's title to a dam constructed for a public purpose is not the same, nor is it supplemented by the same privileges, nor subject to the same limitations, as is the title of the riparian owner to a

dam constructed for a private purpose. The sovereign may not create power for a private purpose, but for a public purpose may create and use it regardless of the limitation affecting the riparian owner, that the use shall not injure either upper or lower riparian owners. It follows, we contend, that if power be created by the construction of a dam or other public work builded to further the public purpose of navigation, it necessarily must be incidental to the public work.

The fact that all the waters of the river have not been used by the company does not affect its right of use. For says Chief Justice Gibson in the case of McCalmont v. Whitaker, *supra:* "The water-power" * * * "*consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it.* This natural power is as much the subject of property as is the land itself." * * * "*It may be occupied in whole, in part, or not at all, without endangering the right or restricting the mode of its enjoyment,* unless where there has been an actual adverse occupancy for a period commensurate with the statute of limitations."

And the New York Court of Appeals, Denio J.: "The omission by the owner during twenty years to make use of water-rights does not impair his title or confer any right thereto upon another. It is not the non user by the owner, but the adverse enjoyment by another during the twenty years, which destroys his right."

Townsend v. McDonald, 12 N. Y. 381.
Pillsbury v. Morse, 44 Me. 154.

The Kaukauna case establishes two propositions:

First. That the title to *lot 5 on the South side,* where the dam abuts, was private property, which could only be taken by the state or the United States in the exercise of eminent domain on making compensation or its equivalent; and that the act of congress of 1875 providing a method for securing compensation was the equivalent, even though the act had been repealed before an effort to secure compensation thereunder had been made; but as the act had been in force for thirteen years prior to its repeal, a sufficient time for securing compensation had elapsed, and compensation not having been applied for, was waived. It is true that in connection with *lot 5* the opinion refers to a comparatively unimportant undeveloped water-power *along its front,* and finds

that for injury to lot 5 by flooding this power, had the claim not been waived, the Water Power Company would have been entitled to receive compensation from the government. Says the opinion:

(p. 276.) "So far, however, as land was actually taken for the purpose of the improvement, either for the dam itself or the embankment, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation." * * * And (p. 277) "inasmuch as the dam abuts upon this lot (5), its owner was doubtless entitled to compensation for the land occupied by the dam and embankment, as well as for the value of the use of the water diverted from its natural course."

The injury done to this power, if any, so far as disclosed in the record in the case, was in fact all done by *flowage*, "as" (says the opinion, p. 270) "the water continued to flow past the lot as it had previously done, though at a higher level than before." The opinion's reference to injury from "diversion" may properly be applicable to diversion "from the uses to which the riparian owner would otherwise have been entitled to devote it;" but, as applied to diversion of water from the channel in which it was accustomed to flow, has no application to the facts of the case nor to the Wisconsin statute, which as construed does not give damages in compensation unless some portion of the *land* itself be taken;[1] and hence, such application, if intended, was, as we venture to assume, inadvertently made in the light of the recent Gibson and Shively cases, and the state cases as well, all holding that the sovereign may divert public waters — may use its own — without making compensation to the riparian owner. Even the requirement to make compensation for *lands* overflowed,— "*taken*" *by flooding* — while sustained by this court in the Pumpelly case, is in the Gibson case held to be the "extremest qualification of the doctrine to be found." The references of the opinion to eminent domain and to compensation will all be found to have relation to lot 5 and the

[1] Hanlin v. Railway Co., 61 Wis. 515.

undeveloped water-power along its front, and not in any instance to the appropriated waters above the dam.

Second. The other proposition established is, that the use of all the waters gathered in the pond above the dam was *appropriated* by the state in the exercise of a sovereign right without liability for compensation, and that the use of the surplus waters not required for navigation was transferred to the Canal Company. The proposition that the use of *all of* the waters was so appropriated was based on the public necessity therefor, namely, that the state should have absolute control of the dam and of the waters above the dam "in order to preserve at all times a sufficient supply for the purposes of navigation," and also to the end that navigation be protected it was necessary that the state should reserve to itself "the immediate supervision of the *entire supply.*" These are the two propositions of the opinion, and throughout the opinion the two are separately treated, the references being to one or to the other, but not to both. And the state court in the same case, to the same last-named proposition, say:

"It was of vital interest, therefore, to the state, that it or the corporation to which it intrusted the preservation and maintenance of the improvement should have the entire and *absolute control of the dam, embankments, canal and all appliances necessary for the purposes of navigation, as well as of the waters in the pond created by the dam.*"

These were the propositions ruled by this and the state court in a case in which from the record it appeared (p. 636) that then, as now, the Canal Company was using the waters of the pond in question, and discharging them from the canal into the North channel of the river and at the places where now it is using and discharging them. The right to so use was, as we contend, included in the ownership or right of use, which by both courts was adjudged to be vested in the Canal Company.

The opinion thus upholding the Canal Company's title, and thereby affirming the judgment of the state court, further (p. 273) says:

"As there is no need of the *surplus running to waste,* there was nothing objectionable in permitting the state *to*

let the use of it to private parties, and thus reimburse itself for the expense of the improvement."

And again at the foot thereof (p. 282) further says:

"We do not undertake to say whether a bill in equity, framed upon the basis of a large amount of *surplus water not used*, might not lie to compel an equitable division of the same upon the grounds that it would *otherwise run to waste*."

It is plain that the "surplus water not used," and which might be divided on the ground that it "would otherwise run to waste," mentioned in the latter paragraph (282), is not the identical "surplus running to waste" referred to in the former paragraph (273). Clearly its reference is to only so much of the former as was not being used by the "private parties" to whom it was let in order to reimburse the state. The latter paragraph, confined in its application to water permitted (by the Canal Company) to waste, was, as we understand it, intended to interpret or limit, and to affirm as interpreted, what this court understood to be the limitation made in the judgment of the state court, namely:

"We do not here determine the relative rights of the plaintiff and other riparian owners below the dam in respect to the use of the water *which would run over the dam if not taken from the pond into the* canal, nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam." (70 Wis., op. 657.)

That this was the interpretation given by this court would seem to follow from the part of its opinion given at page 276,[1] to which reference is made, stating facts showing the *bona fide* purpose pursuant to which the dam was builded,

[1] (p. 276) "No claim is made in this case that the water-power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purpose of navigation at all seasons of the year. So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal, and was not a colorable device for creating a water-power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement. Under the circumstances of this case, we think it within the power of the state to retain within its immediate control such surplus as might incidentally be created by the erection of the dam." Kaukauna Case, 142 U. S. 276.

facts equally well shown in the case at bar, for in neither this nor the Kaukauna case is there allegation or proof to the contrary, and both dam and dam extension or canal were builded by the state at the same time as parts of the same work. So interpreted, the judgments in the Kaukauna case, of both this and the state court, are to the effect stated in the opinion of the state court, as follows (p. 651):

"*We conclude, therefore, that whatever rights the state took to the Kaukauna water-power by the act of 1848 (which is the absolute ownership of the whole thereof, if that is a valid act) is vested in the plaintiff.*"

And because impelled thereto by these decisions, acting directly upon the facts in the case at bar, the superior court entered its first judgment January 19, 1894, whereby it adjudged to the Canal Company the ownership and prior right of use for power of all of the surplus waters of the river, whether at the dam or below the dam, or below the lock or elsewhere, wheresoever the Canal Company should elect to use the same.

Assuming for the mere purposes of the statement that the structure below the cross-section of the dam extending down stream be not an extension of the dam, but a canal proper, nevertheless it is, quite as much as the cross-section of the dam, a part of and one of the works of improvement, and the water-power created thereby, there being a fall in the bed of the river of over eleven and nearly twelve feet from the foot of the dam to the first lock, is now, as we contend, vested in the Canal Company. The appropriation or reservation made by the act of 1848 was of all powers created by "any dam erected *or other improvements* made on any of said rivers," and all of the grants, transfers and transactions affecting the dam, and under which the Canal Company acquired its title to the water-powers created thereby, embraced and covered in, in quite or almost the language of the act of appropriation, other works of improvement as well as the dam, so that necessarily the same title was acquired to water-powers created by "other works of improvement" as was acquired by the words "any dam." Nor can any reason be assigned why it was not as necessary

to the public weal that all of the waters of the river be appropriated for the canal and there be controlled by the government, as that they be appropriated for the dam and there controlled. So that, whether the water-powers in question be created by the dam or by a work of improvement immediately connected therewith, seems to be unimportant, as in either case they appear to be the property of the Canal Company. But we contend that the down-stream structure is not an independent work of improvement, and that it is *part of the dam.* It is the *entire structure* which upholds the high level of the pond,—a level fifteen feet above the surface level of the pond in the Middle channel. Commencing with the embankment on the south side running down to lot 5, thence with the cross-stream section extending near but not to the north bank, thence down stream about eleven hundred feet, and thence necessarily following the high bluff inland a further distance of about one thousand feet to the first lock, the parts all taken together constitute the structure which upholds this level. This structure from the south embankment to the first lock on the north side is a strong embankment expressly designed and constructed so as successfully to resist the power of the river. It is no more true that the portion of the structure over which the spill is made is the dam than that the embankments on either the north or the south side are the dam. Each part equally with the other parts resists the force of the water, and maintains at one and the same level all of the waters of the river. It is a structure not different in character and effect from one constructed on a straight line, for in the one case not more than in the other would the entire structure be necessary, and each part be required to be equally strong in order to resist the pressure. It follows, we submit, that if the entire structure be the dam, the Kaukauna case in effect adjudges that the power of the surplus water created thereby, including the power in use, belongs to the Canal Company; while if the canal be an independent work of improvement separate from the dam, it yet is authority, we contend, to propositions under which the Canal Company's claim of title is equally secure.

The state court, speaking of a *down-stream structure or*

embankment similar to all intents and purposes with the one under consideration, on the same river and part of the same work of improvement, and connected with the cross-section of a dam higher on the river than the dam in question, held that such portion of dam or embankment extending down stream below the cross-section was a *wing of the dam.* In Lawson v. Mowry (52 Wis. 219, op. 237) say the court:

"The water-power thus created by the dam was not necessarily confined to the *use of it at the dam.* It is common to conduct water from a pond created by a dam by means of artificial channels, in order to make available the increase of the head by reason of the additional fall in the bed of the stream below the dam. The embankment or land between such artificial channel and the bed of the stream is, nevertheless, as necessary to preserve the water-power as the dam itself. *It is, in effect, nothing less than a wing of the dam. The canal down as far as the lock is in effect nothing less than an enlargement or arm of the pond created by the dam.* It is the fall of the water which gives the power, and the power which gives the value for hydraulic purposes."

See Century Dictionary — *Dam*, noun, "A dam, a body of water hemmed in — I. A mole, bank or mound of earth, or a wall, or a frame of wood, constructed across a stream of water to obstruct its flow and thus raise its level, in order to make it available as a motive power, as for driving a mill wheel. Such an obstruction built for any purpose, as to form a reservoir, to protect a tract of land from overflow, etc.; *in law*, an artificial boundary or means of confinement of running water or of water which would otherwise flow away. II and III not applicable. IV. The body of water confined by a dam."

The sixth and seventh assignments of error present the question here discussed, and already here and in briefs on motion to dismiss, to which reference is made, has their federal character been considered.

The title or right by the judgment under review denied to the Canal Company, and conferred upon it, as we contend, by the state supreme court in the Kaukauna case, was specially set up in the Canal Company's answer and counterclaim herein. (Pr. Rec., p. 56.) And in the same as amended. (Pr. Rec., p. 99.) This amended answer with

counter-claim was served on and prior to August 21, 1890, and subsequently thereto, on the 21st day of December, 1891, the state judgment in the Kaukauna case so set up was affirmed in this court as stated, thereby affirming, interpreting and operating upon the judgment so set up in the answer. On the trial of the issues raised in the original and cross-suits in the case at bar, the said judgment of this court (142 U. S. 254) was by stipulation of all parties admitted in evidence and presented to the court (Pr. Rec., p. 336, fol. 433), and was considered by the state supreme and superior courts — by the superior court in the entry of its judgment of January 19, 1894, carrying out the spirit and letter of the decision; and again in the superior court at the time of the entry of judgment pursuant to mandate, by the Canal Company's application to amend its answer, thereby specially setting up the claim under this judgment; and *in the supreme court*, as appears from the opinions of the court (Newman, J., Pr. Rec., pp. 543–545, and Cassoday, C. J., Pr. Rec., p. 594), although failing to give effect to this court's judgment.

III.

Assuming that the rights of property in question were taken in the exercise of EMINENT DOMAIN, a proposition which is UNQUALIFIEDLY CONTROVERTED AND DENIED, nevertheless, the judgment entered in the case deprives the plaintiff in error of such rights of property without due process of law, and is in violation of the constitution of the United States and the fourteenth amendment thereof.

(*1*) *No provision was made for compensation. The condemnation acts relating to the improvement were not intended to cover the diversion of water.*

Sections 15 and 17 of the Board of Public Works Act authorize the seizure of "all lands, waters and materials, the appropriation of which shall in their judgment be necessary," and make provision for compensation. Section 16 purports to be a release by the state of all such "lands,

waters and materials" belonging to it, and also of contiguous lands needed for hydraulic purposes; and then follow the words of appropriation which we have considered. These words, "whenever a water-power," etc., constitute an appropriation as distinguished from a seizure in eminent domain. They are an assertion of ownership and stand in sharp contrast with the words of sections 15 and 17, directing seizure and compensation. The words "lands, waters and materials" refer to lands and materials," as distinguished from water, and to "waters," as being tributary or feeding waters, as distinguished from the waters of the river. And the same distinction applies to the other condemnation acts, for the legislative acts of 1874 and 1881,[1] and the congressional act of 1875,[2] all relate to "*lands.*"(a)

The suggestion that the company's claims are restricted by the blue line projected on its maps, if of any significance whatever, can relate only to its claims to lands on the bank, and cannot affect its right of use of water.

(2) *Assuming, however, that the condemnation acts* DO *apply to the diversion of water* (*i. e.*, that the word "lands" includes "waters"), they confer in such case, by giving compensation, a gratuity voluntarily given to private claimants; and should defects in the condemnation acts render them inoperative, it is the gratuity which fails and not the appropriation; *the appropriation unaffected thereby remains operative.*

It is competent for congress or the legislature to award compensation as a gratuity or condition.[3]

(3) *Still assuming the applicability of the condemnation acts to the diversion of water, the acts themselves are not defective, but are valid and operative.*

The acts of 1874 and 1881[4] are enabling acts, the latter designed to aid in carrying into effect the congressional act

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[1] C. C. Doc., 77 and 78½, ch. 292, Laws 1874; ch. 320, Laws 1881.
[2] C. C. Doc., 78, ch. 166, Stats., etc. 1875.
[3] Lewis on Em. Dom., §§ 207-217; Goodrich v. Milwaukee, 24 Wis. 422, etc.
[4] C. C. Doc., 77 and 78½; ch. 292, Laws 1874; ch. 320, Laws 1881.

(a) See Kaukauna Case 142 U.S. 279. & Gibson case 166 U.S. 269. Conflicting

of 1875,[1] and these together with the act of 1875 were sustained in the Canal and Kaukauna Company cases.[2]

The mooted question is as to the validity of the compensation provisions of the Board of Public Works Act of 1848, sections 17 to 21. Our contention is that these provisions furnish constitutional compensation. It is compensation furnished by the state acting vicariously for the United States. The claim is that the act is defective within Shepardson v. Railroad Company,[3] in not giving the land-owner power to set the proceedings in motion and in not furnishing an ample fund for payment of compensation. A distinction is made between cases where the proceedings are conducted by private corporations and those by the state or United States itself. It is not to be presumed in the case of state or United States that they will fail to set the proceedings in motion. In the absence of statutory authority there is no right of suit against either, the presumption of good faith and right-doing on the part of the sovereign being conclusive, and equally so in these proceedings. Nor is prior payment of compensation required, the accumulated wealth of the government and state being the equivalent therefor, and is so held with respect even to *quasi*-municipal corporations, such as townships and road districts. The requirement to pay from the improvement fund was in effect merely a requirement to exhaust that fund before going to the general fund. But the improvement fund was ample in itself. Embracing as it did proceeds of land and water-power sales, it was sufficient to pay nearly a million of dollars in the construction of the improvement, of which the greater part was expended in payment of indebtedness incurred subsequent to the time the right, if any, to damages on the part of the riparian owner arose.[4] But, say appellants, the Canal and Kaukauna Company cases appear to

[1] C. C. Doc., 78, ch. 166, Stats. 1875.
[2] Jones v. United States, 48 Wis. 385.
[3] 6 Wis. 605.
[4] C. C. Doc., 121 (z) to 135.

hold that the act of 1848 was insufficient in the matter of compensation. We do not so understand the decisions. True, Mr. Justice Brown, while upholding the constitutionality of the act of 1848, intimates, *obiter*, that it had been held by the state court that the provision for compensation was insufficient; but such is not the fact. It was not so held by the United States court in the Pumpelly case (13 Wallace, 166), according to the opinion of Chief Justice Lyon, given in G. B. & M. C. Co. v. K. W. P. Co. (70 Wis. 654), nor, as he says in that opinion, was it so held in Sweeney v. United States (62 Wis. 396), wherein Orton, Judge, writes the opinion, both cases misapprehending the decision in the Pumpelly case. And on like misapprehension Chief Justice Dixon in Arimond v. G. B. & M. C. Co. (31 Wis. 316) criticises the United States supreme court. And these, the cases referred to, are the only cases in which the question has been considered. We think the law unquestionably is that the provision for compensation in the act of 1848 was sufficient. In United States v. Jones (109 U. S. 513, op. 518), a case relating to this river, the court says: "There is in this position an assumption that the ascertaining of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case."

(4) *Still assuming the applicability of the condemnation acts and their validity*, the ordinance, constitution and the declared reservation of the Board of Public Works Act, and acts amendatory thereof, the plan and the modifications thereof prepared by the board of public works and approved by the legislature, and the overt act of commencing the construction of the work, all were acts of a public nature, giving constructive notice of themselves to all persons to be affected. Together they constituted a SEIZURE of the waters of the river and gave to all parties claiming to be injured *a right of present action;* a right upon which all parties have slept beyond the statutory life thereof,

namely, for over twenty and nearly forty years, and hence have waived the same.

The Board of Public Works Act, following the constitution and the ordinance of 1787, declared that every water-power to be created was appropriated to the state. A plan of improvement, contemplating enlargement from time to time, was adopted by the legislature, and work under this plan of improvement commenced. All of these acts of legislation and the plan itself, and the commencement of work thereunder, were public matters of which all people were bound to take notice. Commencing the work was the overt act of SEIZURE, giving thereby to *all parties to be affected* a present right of action. The *seizure* was made pursuant to law, whereby the intent to take is unalterably declared in advance of actual taking, and became effective when the declaration was followed by an overt act, and thereby is distinguished from the more common act of seizure made in violation of law, as the basis for claim of title, and with reference to which the presumption is that there is no intent to take (it being unlawful) until actual seizure is made.

Says Lewis on Eminent Domain: "The act of entry" (under a proper eminent domain law) "is distinguishable from that of an ordinary trespasser." * * * "There was no intention to hold adverse possession; indeed, there was not a single element in the case which characterized a tortfeasor, etc., and hence the owner should not have the value of the improvements."[1]

Say the Massachusetts court: "An actual withdrawal of the water is not necessary to constitute an actual taking, unless it is expressly required. The case is not like a claim to a prescriptive right which had its beginning in wrong. There the extent of the prescriptive right gained might very well be measured by the extent of the actual wrong done for the necessary time, unaffected by the extent of the claim of right under which it was done. Horner v. Stillwell, 6 Vroom, 307. But here the city could lawfully gain any right in the stream which it chose to take, and when it did a public act of dominion which was of permanent effect, and which depended on a vote for its jurisdiction, the character and ex-

[1] Lewis on Eminent Domain, secs. 499–565.

tent of the dominion assumed were determined by the vote to which the act thus necessarily referred. This almost follows from Ipswich Mills v. County Comm'rs, 108 Mass. 363, where a partial withdrawal of the water set the time of limitation running as to the whole."[1]

And again: "The city of Salem was authorized, for the purpose of supplying its inhabitants with pure water, to take, hold and convey into and through that city the waters of Wenham pond, and the waters which flow into and from the same, and any water rights connected therewith. No application for damages was to be made until the water is actually withdrawn or diverted by said city. Any person or corporation whose water rights are thus taken or affected may apply as aforesaid at any time within one year from the time when the water is first actually withdrawn or diverted."

After the one year had run from the first withdrawal, owing to increase in use of water by supplying the town of Beverly, a party was injured who prior thereto had not been injured. Say the court: "The statute was plainly intended to provide, not merely for the convenience of Salem, but also to furnish a like supply to all other towns upon the line of the works that should apply for it and make an equitable compensation therefor. It had in view not merely the present wants of all these municipal corporations, but also their future and prospective wants, which of course must go on increasing with the increase of their population. We cannot say that their future wants may not take *all* of the water of the pond, etc. If every person whose water rights are by such increase affected is to be understood to have a new claim for damage for every increase, it is easy to see that the subdivision of claims and the frequent renewal of litigation will lead to inconvenience, and substantially deprive the city of the limitation intended by the statute. Hence *all* damages were included, 'future and prospective as well as immediate.'" Citing Ipswich Mills v. County Comm'rs, 108 Mass. 363.[2]

The city of Fitchburg (Mass.), respondent, "duly laid out a way on June 28, 1887; its entire length as located being 3,350 feet, including a strip of land taken from the petitioners 1,080 feet in length and 40 feet in width." "Subse-

[1] Worcester Gaslight Co. v. County Comm'rs, 138 Mass. 289-291; Washburn, etc. Co. v. Worcester, 153 Mass. 494.

[2] Bailey v. Woburn, 126 Mass. 416; Lewis on Em. Dom., sec. 503 (3); Watuppa Res. Co. v. City of Fall River, 147 Mass. 548.

quently, on October 2, 1888, the respondent duly laid out another way, running in part near the location of the original way, of which a portion was at the same time discontinued." "The land of the petitioners was not entered upon for the purpose of constructing the way before the discontinuance, but it was admitted by the respondent that a small portion of other lands not owned by the petitioners, but embraced in the original laying out, was taken possession of by the respondent for the purpose of constructing the way before the filing of the petition (*i. e.*, this petition for compensation), etc., etc. C. Allen, J.: "The discontinuance of a portion of the way laid out does not have the effect to cut off the petitioners' right to damages for the taking of their land, which was included in the portion of the way so discontinued. Where a way is laid out over the land of several persons, an entry for the purpose of *constructing any part* of the way is deemed a taking of possession of all the lands included in the laying out made upon the same petition. Pub. Stat., ch. 49, par. 88. It was that such entry had been made before the filing of the petition, though not upon the land of the petitioner," etc., etc.[1]

In an action of tort for breaking and entering the plaintiff's close and removing the plaintiff's fence therefrom, defendant, as an officer, contended that the land was within the limits of State street (Boston). The city council on April 6, 1874, passed an ordinance, approved April 16, 1874, to widen said street in accordance with a certain plan, and for that purpose to take land belonging to the plaintiff and other persons mentioned. The plan was filed in the clerk's office April 6, 1874. The city entered upon and took possession of all the parcels of land described, within two years, excepting the land belonging to the plaintiff, upon which no entry was made, and of which no possession was taken until August, 1876. Chapter 303 of the statutes of 1869 relates to the opening of streets, and contains a proviso: "That an entry for the purpose of constructing any part of the laying out should, for the purposes of this act, be deemed a taking of possession of all the lands included in the laying out upon the same petition." Whereupon the court held: "That an entry upon any part of the land embraced in the location or alteration was an entry upon all of the lands included in the laying out or alteration made upon the same petition. There was, therefore, by the agreement of the parties, a sufficient entry on the plaintiff's land

[1] Wheeler v. City of Fitchburg, 150 Mass. 350.

within two years from the time when the right to take possession first accrued."[1]

The work was commenced nearly forty years ago. All right of redress, whether for compensation or at common law, has been waived and is lost.

(5) *Assuming that the right of action is not yet outlawed, nevertheless it is a right of action for compensation and not for a title — and for compensation which the United States has assumed to pay.*

The "seizure of property" authorized *by law* was long since made and acquiesced in, and is covered by the condemnation acts in case the word "lands" embraced water rights, as assumed, and hence the only redress is for compensation. And the payment of compensation was assumed by the United States according to both courts.[2] And the same proposition was ruled in the Kaukauna case, this court holding that by failing to present claims until the act of congress of 1875 had been repealed, the right of compensation was lost.[3]

(6) *The appellants' claims are without equity.* Their expenditures were all made with knowledge of the Canal Company's rights and after notice to desist. The waters of the river were appropriated while the riparian properties, which they have combined into one ownership, were held by the government, or at least were held in separate ownerships, having little value for water-power purposes.

Assuming to be true the appellants' contention that the right of use of the flow is an incident to the title to the bed of the river, it is shown that the title was not in appellants prior to the time Wisconsin became a state, and there is no proof of subsequent transfer, and among Wisconsin's first legislative acts as a state are the acceptance of the land grant

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[1] Roe v. Blake, 123 Mass. 543; Rider et al. v. Stryker, 63 N. Y. 136; In Matter of Furman Street, Brooklyn, 17 Wend. 649; Rogers & Magee v. Bradshaw, 20 Johns. 735, 64 Me. 573.

[2] Jones v. United States, 109 U. S. 513; Id., 48 Wis. 385; Attorney-General Pierpont, C. C. Doc., 84.

[3] Kaukauna Case, 142 U. S. 257.

in trust and the creation of the Board of Public Works, which operated as to the Fox river and the part of the Wisconsin river below the portage, to reserve to the public the beds thereof for use by the United States in improving the navigation of the same. But even with title to the bed it was not competent for riparian owners to erect dams for the utilization of the flow, inhibited *as it is by the statute.*

(7) Even assuming that all the waters were not appropriated, nevertheless all may at any time be appropriated and undoubtedly will be appropriated, and when taken, the surplus not needed for navigation belongs to the company, the compensation therefor, if any required, to be paid by the United States; so that on any theory the waters for division between the several channels of the river were all subject to the Canal Company's right to the surplus water when diverted.

It is the water allowed to waste over the spill of the dam which is for division. By permitting it to waste the right of user is not lost. "It is not the non-user by the owner, but the adverse enjoyment by another during twenty years, which destroys his right."

Respectfully submitted,

B. J. STEVENS,

Solicitor for Plaintiff in Error, The Green Bay and Mississippi Canal Co.

Madison, Wisconsin.

E. MARINER,

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Milwaukee, Wisconsin.

APPENDIX

OR

COMPILATION OF STATUTES AND DOCUMENTS REFERRED TO IN CANAL COMPANY'S (PLAINTIFF IN ERROR) BRIEF ON THE MERITS.

STIPULATION IN RECORD.

"All parties agree that the report of the board of arbitrators to value this property and report of the secretary of war submitting the same to congress, together with the report of Captain Houston to the secretary of war, being a part of the report of the secretary of war, shall be considered in evidence; same are printed at length in the report of the secretary of war to congress, dated March 8, 1872, and said reports may be read from the report of such secretary of war, and are made part of this bill of exceptions without copying the same at length, and same are printed also at length on pages 62 to 74, inclusive, of the compilation of laws and documents relating to hydraulic power of the Fox or Neenah river, compiled by the Green Bay & Mississippi Canal Company in 1881, which has been in common use in these litigations and accepted as authentic, a copy thereof being in the state library at Madison, and said reports may be read therefrom and are made part of this stipulation without copying the same at length." (Pr. R., pp. 335, 336.)

ORDINANCE OF 1787.

(Wis. R. S., 1858 ed., p. 1065, sec. 13, art. IV.)

"In Congress, July 13, 1787.

1. Be it ordained * * *

13. * * *

It is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as articles of *compact* between the original states, and the people and states in the said territory, and *forever remain unalterable* unless by common consent, to wit: * * *

ARTICLE IV.

* * * The navigable waters leading into the Mississippi and St. Lawrence, *and the carrying places between the same, shall be common highways*, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor.

AN ACT ESTABLISHING THE TERRITORIAL GOVERNMENT OF WISCONSIN.

(Wis. R. S., 1858 ed., pp. 1071-1076.)

"Sec. 1. Be it enacted, etc. * * *

Sec. 12. *And be it further enacted*, That the inhabitants of the said territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the territory of the United States, northwest of the river Ohio, *by the articles of compact* contained in the *ordinance for the* government of the said territory, passed on the thirteenth day of July, *one thousand seven hundred and eighty-seven;* and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said territory. * * *

Approved 20th April, 1836."

"AN ACT TO ENABLE THE PEOPLE OF WISCONSIN TERRITORY TO FORM A CONSTITUTION AND STATE GOVERNMENT, AND FOR THE ADMISSION OF SUCH STATE INTO THE UNION.

(Wis. R. S., 1858 ed., pp. 1081-1082.)

Sec. 1. Be it enacted * * *

Sec. 3. And be it further enacted, That the said state of Wisconsin shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Wisconsin, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same; and said *river and waters, and the navigable waters leading into the same, shall be common highways, and forever free*, as well to the inhabitants of said state *as to all other citizens of the United States*, without any tax, duty, impost or toll therefor.

Approved August 6, 1846."

CONSTITUTION OF WISCONSIN.

(Wis. R. S., 1858 ed., p. 23.)

PREAMBLE.

ARTICLE I.

* * *

"Sec. 13. The property of no person shall be taken for public use without just compensation therefor."

* * *

ARTICLE II.

* * *

"Sec. 2. The propositions contained in the *act of congress*" (the enabling act next above given) "are hereby accepted, ratified and confirmed, *and shall remain irrevocable without the consent of the United States;*" * * *

ARTICLE VIII.

* * *

"Sec. 10. The state shall never contract any debt for works of internal improvement, *or be a party in carrying on such works;* but whenever grants of land or other property shall have been *made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works*, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

ARTICLE IX.

EMINENT DOMAIN AND PROPERTY OF THE STATE.

"Sec. 1. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed and bounded by the same. *And the River Mississippi, and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways*, and forever free, as well to the in-

habitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."

Adopted February 1, 1848.

CHAPTER 275, LAWS OF 1850.

AN ACT to amend, etc.

The people, etc., do enact as follows:

"Sec. 1. That all sections and parts of sections of the above entitled act, authorizing the board of public works to reserve to the state, lands valuable for hydraulic, commercial, or other purposes, and upon which any settler had a settlement and claim, prior to the reservation made by said board of public works, is hereby repealed: *Provided, that this amendment of said act shall not be construed to apply to any water-power created by the construction of the canal, or the improvement of the navigation of the Fox and Wisconsin rivers, and so much land adjoining the same as the board of public works may deem necessary to form a part of said water-power.*

Sec. 2. All settlers resident upon any of the lands mentioned in the foregoing section shall be entitled to all the privileges and benefits extended by the act to provide for the improvement of the Fox and Wisconsin rivers to settlers on other lands therein specified.

Approved February 9, 1850."

CHAPTER 277, LAWS OF 1850.

AN ACT for the relief of Joshua F. Cox.

The people, etc., do enact as follows:

"Sec. 1. That in consideration that Joshua F. Cox has contracted to build * * * the improvements designated by the board of public works, in the rapids of Fox river, at Depere, * * * there is hereby granted * * * to the said Cox * * * the free use of all the surplus water for hydraulic power, created by the dam across said Fox river at that place, or which may be hereafter created by raising of said dam, as stipulated in the contract hereafter mentioned, upon condition that the said Cox * * * shall also * * * maintain the dam, lock and canal, of the

size, height and length specified in the aforesaid contract, free of all cost, etc.

Approved February 9, 1850."

CHAPTER 464, LAWS OF 1852.

"AN ACT requiring the board of public works to proceed in the improvement of the Wisconsin river, and to authorize the selling or leasing the hydraulic power at Lift Lock on the Portage canal.

The people, etc., do enact as follows:

Sec. 1. The commissioners of the board of public works are hereby authorized and required to commence the work of improvement of the navigation of the Wisconsin river below the Portage, the present season, and to complete the same as soon as practicable, according to the plans of the chief engineer in his report for the year 1849; and, pursuant to law, to let contracts for such works of improvement.

Sec. 2. * * *

Sec. 3. The board of public works are hereby authorized and empowered to lease such portions of the hydraulic power at the Lift Lock on the Portage canal, at Fort Winnebago, on such terms as they may deem most for the interest of the state, but which shall not in any wise injure the navigation of said canal.

Sec. 4. The moneys derivable from the rents accruing under the lease of such hydraulic power may be expended in the improvement and completion of said canal.

Sec. 5. * * *

Approved April 19, 1852."

ACT OF CONGRESS, CLXX, LAWS 1846, 9 U. S. STATUTES AT LARGE, 83.

"AN ACT to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal, in the territory of Wisconsin.

Be it enacted, etc.: * * * That there be, and hereby is, granted to the state of Wisconsin, on the admission of such state into the Union, for the purpose of improving the navigation of the Fox and Wisconsin rivers, in the territory of Wisconsin, and of constructing the canal to unite the said rivers at or near the portage, a quantity of land, equal to one-half of three sections in width, on each side of the said Fox river, and the lakes through which it passes, from its

mouth to the point where the portage canal shall enter the same, and on each side of said canal from one stream to the other, reserving the alternate sections to the United States, to be selected under the direction of the governor of said state, and such selection to be approved by the president of the United States. *The said rivers when improved, and the said canal when finished, shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever for the transportation of the mails, or for any property of the United States, or persons in their service passing upon or along the same; provided*, the said alternate sections, reserved to the United States, shall not be sold at a less rate than two dollars and fifty cents the acre; *provided also*, that no preemptive claim to the lands so reserved shall give the occupant, or any other person claiming through or under him, a right to said lands at any price less than the price fixed in this act, at the time of the settlement on said lands.

Sec. 2. *And be it further enacted, that as soon as the territory of Wisconsin shall be admitted as a state into the Union, all the lands granted by this act shall be and become* the property of said state for the purpose contemplated in this act, and no other: *Provided*, that the legislature of said state shall *agree to accept* said grant upon the terms specified in this act; and *shall have power to fix the price at which said lands shall be sold, not less than one dollar and twenty-five cents the acre; and to adopt such kind and plan of improvement on said route as the said legislature shall from time to time determine for the best interest of said state. Provided, also*, that the lands hereby granted shall not be conveyed or disposed of by said state, except as said improvements shall progress; that is, the said state may sell so much of said lands as shall produce the sum of twenty thousand dollars, and then the sales shall cease until the governor of said state shall certify the fact to the president of the United States, that one-half of said sum has been expended upon said improvements, when the said state may sell and dispose of a quantity of said lands sufficient to reimburse the amount expended; and thus the sales shall progress as the proceeds thereof shall be expended, and the fact of such expenditure certified in the manner herein mentioned.

Sec. 3. *And be it further enacted, that the said improvement shall be commenced within three years after the said state shall be admitted into the Union, and completed within twenty years*, or the United States shall be entitled to receive the amount for which any of said lands may have been

sold by said state: *Provided*, that the title of purchasers under the sales made by the state in pursuance of this act shall be valid.

Approved August 8, 1846."

ACT OF WISCONSIN LEGISLATURE OF AUGUST 8, 1848.

(Board of Public Works Act.)

The people, etc., do enact:

Sec. 1. The construction of the improvements *contemplated by the act of congress entitled 'An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin rivers and to connect the same by a canal in the territory of Wisconsin,' approved August 8, 1846*, and the superintendence and repair thereof after the completion, shall be under the direction and control of a 'Board of Public Works.'

Secs. 2 to 14 relate to organization of board, and deemed unimportant in this connection.

"Sec. 15. In the construction of such improvements the said board shall have power to enter on, to take possession of and use all lands, waters and materials the appropriation of which for the use of such works of improvement shall in their judgment be necessary.

Sec. 16. When any land, waters or materials appropriated by the board to the use of said improvements shall belong to the state, such lands, waters or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the state, and whenever a water-power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water-power shall belong to the state subject to future action of the legislature.

Sec. 17. When any lands, waters or material appropriated by the board to the use of the public in the construction of said improvements shall not be freely given or granted to the state, or the said board cannot agree with the owner as to the terms on which the same shall be granted, the superintendent under the directions of the board shall select an appraiser and the owner shall select another appraiser, who together, if they are unable to agree, shall select a third, neither of whom shall have any interest directly or indirectly in the subject-matter nor be of kin to such owner, and said appraisers or a majority of them shall proceed to hear

testimony and to assess the benefits or damages, as the case may be, to the said owner from the appropriation of such land, water or materials, and their award shall be conclusive unless modified as herein provided. If the owner shall neglect or refuse to appoint an appraiser as herein directed after ten days' notice of such appointment by the superintendent, then such superintendent shall make such appointment for him."

Secs. 18 to 22 provide for condemnation proceedings and damages to be paid out of the fund.

Secs. 23 to 43 inclusive relate to the conduct of business of the board and to the disposal of the grant of lands.

Sec. 44 provides that all suits shall be brought "in the name of the state."

Sec. 45. The governor is "invested with the general control and supervision of the whole work," etc.

Secs. 46 and 47 unimportant.

Approved August 8, 1848.

CHAPTER 74, GENERAL LAWS OF WISCONSIN, 1849.

"AN ACT to prescribe certain duties of the board of public works, and to amend an act entitled 'An Act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal,' approved August 8, 1848.

The people, etc., do enact:

Section 1. That the board of public works shall proceed in the improvement of the Fox and Wisconsin rivers and the connection thereof by a canal, in the manner by them recommended in the report to the legislature, that is to say: The said board shall first provide for the construction of the portage canal, the improvement of the Neenah or Fox river above Lake Winnebago, the improvement of the Rapid Croche, and the improvement at Desperes; and the said board shall be and hereby are limited in their expenditure and contract for carrying on the said work for the year A. D. 1849, to a sum not exceeding $100,000.

* * *

Approved March 6, 1849.

CHAPTER 283, GENERAL LAWS OF WISCONSIN, 1850.

"AN ACT to amend an act entitled 'An act to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by a canal.'

The people, etc., do enact as follows:

Sec. 1. The board of public works are hereby authorized and empowered in any future lettings of contracts for

the improvement of the Fox and Wisconsin rivers to consider bids made by any person or persons for improvements *which will create a water-power, and when such* person or persons offer to perform, or perform and maintain the work in consideration of the *granting by the state to him or them, his or their assigns, forever, the whole or a part of such water-power:* Provided, that before such bid is accepted and the contracts entered into, it shall receive the approval of the governor.

Sec. 2. * * *

Sec. 3. When lettings have been made for the improvement of said rivers, *whereby a water-power is created,* the board of works may relinquish to the person or persons who have performed the same *all or a part of such power as a consideration in full or in part for such performance or maintenance of such improvement, or for both:* Provided, that such relinquishment shall also receive the approval of the governor and be made after receiving security as provided in section 2.

Sec. 4. * * *

Approved February 9, 1850."

CHAPTER 179, GENERAL LAWS OF WISCONSIN, 1851.

AN ACT authorizing the governor to enter into a contract with Morgan L. Martin for the improvement of Fox river between Lake Winnebago and Green Bay.

The people, etc., do enact as follows:

Sec. 1. The governor is hereby authorized to accept the proposition made to him on the 31st day of January, A. D. one thousand eight hundred and fifty-one, by the Hon. Morgan L. Martin for the completion of the improvement of Fox river between Green Bay and Lake Winnebago, and to enter into contract with the said Morgan L. Martin, according to terms and conditions thereof: *Provided,* that the said Morgan L. Martin shall give security satisfactory to the governor to complete said work on or before the first day of June, A. D. one thousand eight hundred and fifty-three.

Sec. 2. Provides for "payment in scrip" if there be no fund in treasury.

* * *

Approved March 11, 1851.

(Terms and specifications of the contract with Martin, see C. C. Docs., pp. 30*a* to 30*p*.)

The contract provides that this "scrip" shall be in the following or equivalent form:

STATE OF WISCONSIN.

No. ——. Office of The Board of Public Works.
Oshkosh.

—— ——, 185–.

It is hereby certified by the board of public works of the state of Wisconsin, that there is due to Morgan L. Martin, or order, —— dollars, under his contract with the state for the improvement of the Fox river, payable out of the avails of the grant of land in aid of the improvement of the Fox and Wisconsin rivers, and the revenues thereof.

—— ——, President,
of the Board of Public Works.

Attest:
—— ——, Clerk.

EXECUTIVE OFFICE,
Madison. ——, 185–.

I, —— ——, governor of the state of Wisconsin, do hereby certify that the foregoing scrip for —— dollars to Morgan L. Martin is issued in conformity with an act of the legislature, entitled 'An act authorizing the governor to enter into contract with Morgan L. Martin for the improvement of the Fox river between Lake Winnebago and Green Bay,' approved March 11, 1851, and is payaole out of the avails of the grant of land in aid of the improvement of the Fox and Wisconsin rivers and the revenues thereof, and is redeemable at the pleasure of the state; that the said scrip bears interest at the rate of twelve per cent. per annum, payable annually, on the 1st day of January, at —— (deducting the current rate of exchange at Milwaukee); and that for the redemption of the said scrip, and the payment of the interest to become due thereon, the improvement of the Fox and Wisconsin rivers, and the revenues to be derived therefrom, stand pledged by the state.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the state.

Done at Madison, this —— day of ——, 185–.

By the Governor:

—— ——,
Secretary of State.

CHAPTER 340, GENERAL LAWS OF WISCONSIN, 1852.

AN ACT to provide for the completion of the improvement of the Fox and Wisconsin rivers.

The people, etc., do enact as follows:

This act provides for issuance of stock certificates.

Section 5 provides: * * * The said certificate shall be in the following or equivalent form:

STATE OF WISCONSIN.

Improvement Fund Certificate.

State Department,
Madison, ——, 18— }

This certificate entitles —— —— or —— assigns to receive —— dollars on the —— day of ——, 18—, and the interest thereon at the rate of twelve per cent. per annum on the first day of January in each year until the time when the principal sum will be payable at ——; and for the redemption thereof and for the payment of interest thereon, the moneys arising from the sales of land granted by congress to the state of Wisconsin in aid of the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal in said state, and the revenues of said improvement are pledged and appropriated in and by an act of the legislature of said state entitled, 'An act to provide for the completion of the improvement of the Fox and Wisconsin rivers,' approved April —, 1852, without any other pledge or liability on the part of the state.

In testimony whereof the secretary of state, in conformity with the provisions of said act, [L. S.] has hereunto set his hand and affixed the great seal of the state. Done at Madison this —— day of ——, 18—.

Such stock certificate shall be signed by the secretary of state and countersigned by any transfer agent who may be appointed by the governor to negotiate the same."

Sec. 6. The governor is authorized to sell the stock certificates.

* * *

Approved April 17, 1852.

CHAPTER 73, GENERAL LAWS OF WISCONSIN, 1853.

(This act repeals chapters 340 and 464 of Session Laws of 1852.)

(This act repeals said chapters and prohibits.)

Approved April 2, 1853.

CHAPTER 98, GENERAL LAWS OF WISCONSIN, 1853.

AN ACT to incorporate an association for the completion of the improvement of the Fox and Wisconsin rivers.

The people, etc., do enact as follows:

Sec. 1. "Mason C. Darling, Otto Tank, Morgan L. Martin, Edgar Conklin, Benjamin F. Moore, Joseph G. Lawton, Urial H. Peak, Theodore Conkey and their associates, formed under the name and style of the 'Fox and Wisconsin Improvement Company,' by articles of association, dated the first day of June, in the year eighteen hundred and fifty-three, and such other persons as may become purchasers of the capital stock of said association, are hereby incorporated upon the conditions and terms contained in said articles, a copy of which shall be filed in the office of the secretary of state; and the said association shall have all the powers incident to a corporation under the laws of this state.

Sec. 2. The works of improvement contemplated by the act entitled 'An act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal,' approved August 8, 1848, and by several acts supplemental thereto and amendatory thereof, and known as the '*Fox and Wisconsin rivers improvement,' together, with all and singular the rights of way, dams, locks, canals water-power, and other appurtenances of said works; also all the right possessed by the state* of demanding and receiving tolls and rents for the same, so far as the state possesses or is authorized to grant the same, and all privileges of constructing said works and repairing the same, and all other rights and privileges belonging to the improvement, *to the same extent and in the same manner that the state now hold or may exercise such rights by virtue of the acts above referred to in this section,* are hereby granted and surrendered by the state of Wisconsin to the said 'Fox & Wisconsin Improvement Company;' *Provided,* That the said improvement shall in all future time be free for the transportation of the troops of the United States and their munitions of war, without the payment of any tolls whatever; *And provided,* That no provision of this act shall be so construed as to allow, permit or authorize the charge or collection of any tolls or transit duties for the passage of any vessel, goods, merchandise or property of any kind along or over the main channel of said rivers; *And also provided,* That the said company shall charge no higher rate of tolls than was established by the board of public works for the year eighteen hundred and fifty-one and two, which rates of toll shall be uniform at each lock, and to all persons and boats

passing along or through the same; *And further provided*, That each of the members of said company, within thirty days from the passage of this act, shall file with the secretary of state a bond or bonds in the sum of twenty-five thousand dollars, payable to the state of Wisconsin, and shall justify on oath before a judge of the circuit court, that they are worth in unincumbered estate or property the amount of the penalty therein, and conditioned that the said company shall vigorously prosecute the said improvement to completion, and complete the same within three years from the passage of this act, on the line located by the board of public works and as contemplated in the report of the board of public works, and estimated by the chief engineer on the first day of January, 1853, in a substantial and durable manner, and so as to enable boats with a draft of two feet and breadth of thirty feet, during ordinary stages of low water, to pass with facility from Green Bay into the Wisconsin river; shall pay the contractors on said improvement the estimates which shall from time to time become due upon their contract; shall pay said contractors any damages awarded or that may hereafter be awarded them by decree or judgment of any court of this state or of the United States; and shall pay all outstanding evidences of indebtedness on the part of the state as trustee or otherwise issued on account of the said improvement, as the same shall become due, or if now due, within ninety days after demand made upon said company, and further conditioned to save harmless the state of Wisconsin from any and all liabilities in anywise arising or growing out of the said improvement, or any contract, agreement, law or laws in relation thereto: *And provided further*, That no part of the improvement, rights, property or lands mentioned in this act shall pass into the possession of such company; nor shall such company acquire any title thereto, or exercise any right or control over the same, until such company shall first procure from White, Resley and Arndt, Morgan L. Martin, Wm. A. Barstow, William McNaughton and company, and Curtis Reed, the several contractors on the Fox and Wisconsin rivers improvement, releases of all claims and demands which such contractors, or either of them, may have or claim to have against the state, either for work performed under their respective contracts, or for damages by reason of any non-fulfillment of such contract or contracts by the state, to be executed in due form of law, and file the same in the office of the secretary of state. Nothing in this act shall be so construed as to give the company hereby created the right *to collect or receive*

any other or more revenue from the use of said improvement than this state would be entitled to collect or receive if the state should complete said improvement by the expenditure of the grant of land or in any other way.

Sec. 3. As soon as the bond or bonds and releases referred to in the second section of this act be filed with the secretary of state, the said company are hereby authorized to take possession of said improvement, appurtenances, property and assets hereby surrendered and granted unto them, and to proceed to complete the same; and it shall be the duty of the officers and agents having charge of said improvement to deliver to said association all the property, surveys, maps, plats, profiles and estimates belonging to said improvement; an acknowledgment of the receipts of which shall be signed by the officers of said company, and filed in the office of the secretary of state.

Sec. 4. *The lands granted by congress in aid of said improvement, and remaining unsold, shall be and are hereby granted to the Fox and Wisconsin Improvement Company, upon the following terms and conditions, to wit:* Whenever the said company shall deposit with the state treasurer any amount of the outstanding evidences of indebtedness against said improvement funds, or shall transfer and deliver to him any amount of the stock of the United States, or of any state, at its value in the New York market, the said company may select so much of said lands as shall be equal in amount, at $1.25 per acre, to the indebtedness so surrendered, or the value of the stock so transferred; and a descriptive list of the lands so selected, being filed in the office of the secretary of state, the lands shall thereupon be and become the property of said company, without any other or further act to be done or performed on the part of the state. And whenever all the evidences of indebtedness shall be paid and surrendered by the company, all the remaining lands embraced in the grant made by congress, and not previously conveyed to them, and the stocks that may have been transferred as aforesaid, shall be and become absolutely the property of said company; and all the lands so conveyed shall be exempt from taxation of every description by and under any law of this state, until after the same shall have been sold and conveyed, or contracted to be sold or leased or improved by said company; *provided*, said exemption do not continue longer than ten years. And the lands selected by and conveyed to the company as aforesaid shall be in such quantities and under such conditions as specified in the proviso to the second section of the act of congress entitled

'An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal, in the territory of Wisconsin,' approved August 8, 1848: *Provided*, that any person who may have acquired the right of pre-emption under the laws of the state, or the United States, to any portion of the said lands, or has settled thereon in his own right, prior to the passage of this act, shall be entitled to purchase the same of said company, at the minimum price of $1.25 per acre, at any time within three months after said lands shall be selected by the company, and notice of said selection published in a newspaper, printed at the seat of government of the state; and in all cases of contested claims to such right of pre-emption, the judge of the county court is hereby authorized and empowered, either in term time or vacation, to take proofs and hear, try and determine such right, in the same manner as the register of the state land office is now authorized to do by law; and subject to an appeal to the circuit court, as now provided by law for appeals from said register. And it shall be the duty of the governor to take every necessary means to obtain, at as early a day as possible, the lands heretofore selected, and such as may hereafter be located by the company for the balance of the grant in aid of said improvement.

Sec. 5. In all proceedings against the state for damages or other claims on account of said improvement, the award or decree of which, by the terms of this act, would have to be paid by the Fox & Wisconsin Improvement Company hereby incorporated; the said company shall be made a party to said suit, and shall have all the rights and privileges of a defendant therein: *Provided, expressly, that nothing contained in this act shall be construed as an admission of any indebtedness or liability on the part of or against this state, growing out of or connected with any contract heretofore made for the construction or repair of any of the works of improvement on the Fox and Wisconsin rivers.*

Sec. 6. This act shall be a public act, and shall be liberally construed in all courts of jurisdiction, *and the state solemnly pledges its faith to confer by future legislation all such powers as may be found necessary to enable the said corporation to carry into full effect the fair and obvious intent and meaning of this act.*

Sec. 7. This act shall take effect from and after the full organization of said association, and the giving and filing of the bonds hereinbefore mentioned, and thereafter all acts and parts of acts, contravening the provisions of this act,

shall cease to be in force: *and provided*, that after this act takes effect as above, the board of public works shall continue to exercise the duties required by law for the period of thirty days, so far only as to audit and allow all claims and demands for work done and services performed, by direction and employment of said board; and the claims so allowed shall constitute a portion of the debts and liabilities, to be paid and discharged by the said company, according to the provisions of this act, and the obligations of their said bonds. And the said company shall pay to each of the members of said board, the compensation now allowed by law, for the time they may be engaged in auditing and allowing said claims. After the expiration of said thirty days the duties of said board shall cease, and no compensation whatever, shall be allowed for any services claimed to have been rendered thereafter. And after the property, surveys, plats, maps, profiles and estimates, belonging to said improvement, are delivered to said company, and a receipt therefor is given and filed, as provided in the third section of this act, the duties of the register and receiver of the state land office, shall cease in like manner.

Sec. 8. *The state may become the owner and proprietor of the works of improvement* constructed under this act, and of the whole works of improvement, at any time after twenty years, *upon paying to said association or their assigns the actual costs expended by said association in the construction of said improvement, over and above the avails of the grant* of land made by congress, and applied or received by said company to aid in said improvement; the said lands to be estimated at the rate of one dollar and twenty-five cents per acre.

Sec. 9. That the grant made in this act to said company is expressly intended to aid them in the construction and completion of the said Fox and Wisconsin rivers improvement; therefore until the said improvement is completed as contemplated in this act, no part of said grant shall be diverted to any other object.

Approved July 6, 1853."

ARTICLES OF ASSOCIATION,

Showing incorporation of Fox and Wisconsin Improvement Company, given in Canal Company Documents, p. 91.

ACT OF CONGRESS, CHAPTER CC, LAWS OF 1854.

AN ACT to authorize the state of Wisconsin to select the residue of the lands to which she is entitled under the act of eighth of August, eighteen hundred and forty-six, for the improvement of the Fox and Wisconsin rivers.

Be it enacted, etc.:

That the governor of the state of Wisconsin is hereby authorized to cause to be selected the balance of the land to which that state is entitled under the provisions of the act of the eighth August, eighteen hundred and forty-six, granting land to aid the territory of Wisconsin in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal, out of any of the unsold public lands in said state, subject to private entry at one dollar and twenty-five cents per acre, and not claimed by pre-emption; the quantity to be ascertained upon the principles which governed the final adjustment of the grant to the state of Indiana for the Wabash and Erie Canal, under the provisions of the act of congress approved the ninth of May, eighteen hundred and forty-eight.

Approved August 3, 1854.

RESOLUTION OF CONGRESS, NO. 24, LAWS OF 1855.

A RESOLUTION explanatory of an act passed August third, eighteen hundred and fifty-four.

Resolved by the senate and house of representatives of the United States of America in congress assembled, That it was the intention of the act of congress, approved August third, eighteen hundred and fifty-four, and the same shall be construed, to give to Wisconsin in aid of the improvement of the navigation of the Fox and Wisconsin rivers a quantity of land, equal mile for mile of its improvement to that granted to Indiana, under the provisions of the act of congress approved May the ninth, eighteen hundred and forty-eight.

Approved March 3, 1855.

CHAPTER 64, LAWS OF WISCONSIN OF 1855.

AN ACT to provide for the further improvement of the Fox river above Lake Winnebago.

The people, etc., do enact as follows:

Sec. 1. (Provides for extending work of improvement.)

Sec. 2. Whenever any of the canals, locks or dams to be constructed along the said Fox river, as contemplated in the

first section of this act, shall be located upon swamp and overflowed lands, the property of the state, the said company is hereby authorized to appropriate for the use of said canals, locks and dams, the lands upon which the same may be located, and a strip one hundred and fifty feet in width, on each side, and along the whole length of said canals and locks, and all damages which the state might claim on account of such appropriation, or of flowage of land belonging to the state, is hereby released and discharged: *Provided*, that nothing contained in this act shall be so construed as to create any liability against the state for making any improvement contained in this act.

* * *

Approved March 31, 1855.

CHAPTER 112, LAWS OF WISCONSIN, 1856.

AN ACT to secure the enlargement and immediate completion of the improvement of the navigation of the Fox and Wisconsin rivers, and the payment of the scrip and other evidences of indebtedness, issued by the state on account of the same, and for the protection of the settlers on the even sections, etc.

The people, etc., do enact as follows:

Sec. 1. The Fox and Wisconsin Improvement Company, a corporation created by an act of the legislature of the state of Wisconsin, July 6, 1853, are hereby authorized and *required to make all the dams, locks, canals, feeders, and other structures, and to do all the dredging and other work, and furnish all materials necessary to complete the improvement of the navigation of the Fox and Wisconsin rivers*, and the canal connecting the same, and to reconstruct the locks at the Portage and Rapide Croche, and cause the same to be reconstructed at Depere, all in a substantial and workmanlike manner, so that all the locks, dams and other works between Green Bay and the Wisconsin river shall be equal or superior in strength, capacity, kind and quality of materials and workmanship to the best works of the kind heretofore constructed between Green Bay and Lake Winnebago, and that during ordinary low water steamboats drawing four feet of water shall pass with facility from Green Bay to Lake Winnebago, and that boats drawing three and a half feet of water shall pass with facility from Lake Winnebago to the Wisconsin river, and that such boats suited to said locks may meet and pass each other in said Portage canal, and at suitable and convenient places in the other canals, and in the channel of the river, as contemplated in the report of D. C. Jenne, chief engineer, to the directors of

said company, dated September 15, 1856, a copy of which is appended to the report of the select committee of the assembly, of which J. Stark is chairman, and which is on file in the office of the secretary of state, and is here referred to as the general plan of such enlarged works of improvement. Nothing herein contained shall be construed to release any contract or obligation of any person, persons or corporation, for the *maintenance, repair and construction* of the said works at Depere. Said company shall commence the construction of the new locks and dams required to secure the navigation herein provided for, within ninety days after the passage of this act, and shall complete the same, and the canals connected therewith, and all works already commenced upon the contemplated plan, within two years, and shall complete the enlargement and construction of the remaining works, and the necessary dredging of the river, within three years after the passage of this act; such new and enlarged works shall be so constructed as not to impair the existing rights of the lessees of any water-power, upon such improvements, and so as to do no unnecessary damage to property along the line of said improvement. * * * *If it shall be found necessary hereafter to change the plan of the work* recommended in said report of D. C. Jenne, *the same may be done with the approval* of the governor of the state, but in no event shall any change reduce the size or capacity of the improvements, or impair the character or quality of the work, or materials used.

Sec. 2. To enable said company to perform the duties required in the preceding section, all the lands now unsold granted by congress in aid of said improvement, as explained by the same body (and which grants are hereby accepted), are hereby granted to the Fox and Wisconsin Improvement Company, subject, however, to the terms and conditions of said grants by congress, and to the further terms and conditions following, that is to say: That within ninety days after the passage of this act, the said company shall make a deed of trust to three trustees, to be appointed as hereinafter provided, including and conveying to said trustees and their successors all the unsold lands granted to the state of Wisconsin by the several acts and the resolutions of congress to aid in the improvement of the Fox and Wisconsin rivers, *and all the works of improvements constructed or to be constructed on said rivers, and all and singular the rights of way, dams, locks, canals, water-powers,* and other appurtenances of said works, and all rights, privileges and franchises belonging to said improvement, and all property of said company, of whatever name and description, for the

uses, trusts and purposes following, with priority of lien, in the order in which they are named, that is to say:

First. To secure to the state the faithful application of all moneys or property arising from the sale of lands or water-powers, or obtained on the faith of the same, as hereinafter authorized, to the construction and completion of the works of improvement contemplated in this act, as herein provided, and to the payment of all outstanding unpaid evidences of indebtedness issued on the part of the state, for or on account of said improvement, and the interest thereon, in accordance with the terms of this act.

Second. For the payment of any bonds heretofore issued, or that may hereafter be issued by said company, for or on account of said improvement.

Third. To secure to the state the application of the proceeds, or such part thereof as shall be necessary, of the lands claimed for the alternate sections along the Wisconsin river, to the improvement of the Wisconsin river, upon the plans commenced by the state, by the construction of wing-dams, or upon such other plans as may be hereafter adopted by the said company and approved by the governor;

Provided, That nothing contained in this section shall be construed as granting or conveying to said company any right, title or interest whatever, either present or contingent, to section number five, in township number twelve north, of range number nine east, of the fourth principal meridian.

Sec. 3. For the purpose of raising funds, from time to time, for the construction, enlargement and completion of said works of improvement, as required by this act, and for the purchase of materials to be used therein, and the payment of the evidences of state indebtedness above referred to, and interest thereon, and also for the payment and redemption of any outstanding obligations of said company heretofore issued; said company may issue its bonds, countersigned by the said trustees, in sums of not less than five hundred nor more than one thousand dollars each, at rates of interest not exceeding ten per centum per annum, payable semi-annually; the principal of said bonds, payable at a period therein to be named, not exceeding twenty years from their date, and at such place as the company shall designate. The payment of said bonds shall be secured by the deed of trust aforesaid of said lands, works, *water-powers*, property and franchises, as hereinbefore provided; subject, nevertheless, to the prior lien of the state upon said lands and property hereinbefore provided for; which said prior lien shall be referred to in such bonds so to be issued by said

company. The faith of the state shall be in no wise pledged for the redemption of said bonds.

A portion, not exceeding one-fourth of the cash proceeds of *said lands and water-powers*, sold and conveyed by said trustees as hereinafter provided, may upon requisition of said company, from time to time, be applied by said trustees to the payment of interest on loans, or to provide for other expenditures, as the exigencies of the company may require. In case the said company shall fail to comply with any of the requirements of this act, or to pay the principal or interest of its bonds, issued as herein provided, the said trustees shall sell the said lands, in tracts not exceeding six hundred and forty acres, and shall apply the proceeds thereof to the purposes expressed in this act, in the order of priority of liens designated herein; and if the proceeds of said sales are insufficient to complete the intended works of improvement, pay all the evidences of state indebtedness and interest thereon, and redeem all the bonds and other obligations of said company, then the said trustees *shall sell the water-powers created by said improvements*, and thereafter all the corporate rights, privileges, franchises, and property of said company in said improvement, and all appurtenances thereto, to pay the same; and the purchasers thereof shall take, hold and use the same as fully as they are now held, used and enjoyed by said company; but it is understood that until the failure of said company to comply with the terms of this act, it shall retain possession and control of said works of improvement, and have the right to collect tolls thereon, and rents from the lessees of water-powers, and to apply the same to the repair and *maintenance* of said improvement and for other purposes. * * *

Sec. 4. The said trustees may, on the requisition of said company, proceed to sell the lands granted by congress in aid of said improvement, and may sell or lease the water-powers created by said improvement, in such manner and upon such terms, as to price and time and place of payment, as the company may direct. * * * No sales of said lands, or sales or leases of *said water-powers*, shall be made until after the execution and delivery of said deed of trust as above provided.

Sec. 5. * * *

Sec. 6. The trustees shall not at any time during the construction of said works of improvement *sell or dispose of any lands or water-powers* to an amount exceeding the sum which shall then have actually been expended upon the said works, and in the payment of interest and principal of said state indebtedness, but may, at the request of said company,

sell as the work progresses, so as to meet expenditures actually made on the works of improvement, and in the payment of said state indebtedness, as far as the receipts from said sales may go, towards their liquidation; and all lands remaining unsold at the expiration of ten years after the completion of said works of improvement shall be offered at public sale annually, until the whole are disposed of, and the avails applied to the payment of the outstanding bonds of said company as aforesaid, or if no such bonds be outstanding, such avails shall be paid to said company.

Sec. 7. * * *

Sec. 8. The trustees contemplated in this act shall be *appointed by the governor of this state*, with the approval and assent of said company, by a vote of the directors thereof; and any trustee so appointed may be removed by the governor, with the assent and approval of said company, expressed as aforesaid. * * *

Sec. 9. * * *

Sec. 10. * * *

Sec. 11. * * * Nor shall this act be construed as an acknowledgment on the part of the state that any of the evidences of indebtedness herein referred to are a just and valid charge against the state treasury. Nor shall the state be liable for any acts or obligations of said company.

* * *

Approved Oct. 3, 1856.

CHAPTER 66, GENERAL LAWS OF WISCONSIN, 1858.

AN ACT to amend the act to incorporate an association for the completion of the improvements of the Fox and Wisconsin rivers, approved July 6, 1853.

This act provides for an increase of the capital stock to $1,500,000.

Approved April 29, 1858.

CHAPTER 289, GENERAL LAWS OF WISCONSIN, 1861.

AN ACT to facilitate the sale of the lands and other property of the Fox and Wisconsin Improvement Company, to provide for the proper application of the proceeds of such sale, and to authorize the formation of a corporation by the purchasers.

The people, etc., do enact as follows:

Sec. 1. Authorizes the trustees to sell the property secured by the trust-deed mortgage authorized by chapter 112, Session Laws of Wisconsin, 1856.

Sec. 2. Provides that the purchasers shall "take, hold and enjoy all the rights and title to the lands and property purchased by them heretofore held by this state or granted to the said Fox and Wisconsin Improvement Company, or conveyed by the said company to the said trustees with full power to sell, convey or otherwise dispose of the same, which rights and title are hereby confirmed to such purchasers and their assigns forever." * * *

Approved April 13, 1861.

CHAPTER 212, GENERAL LAWS OF WISCONSIN, 1863.

AN ACT to amend chapter 112 of the general laws of 1856, etc.

Sec. 1. * * *

Sec. 2. * * *

Sec. 3. In a case of a sale "the state will waive and does hereby waive and release any and all claim upon or right of redemption in the lands so sold if it has any such claim or right." * * *

Approved April 1, 1863.

DECREE OF FORECLOSURE OF TRUST MORTGAGE.

At a regular term (to wit, the February term) of the circuit court for the county of Fond du Lac, the state of Wisconsin, held at the court-house, in the city of Fond du Lac, in said county, on the 4th day of February, A. D. 1864.

Present the Hon. DAVID TAYLOR, Judge.

ALEXANDER SPAULDING, CHARLES BUTLER, and MOSES M. DAVIS, trustees, plaintiffs,

against

FOX AND WISCONSIN IMPROVEMENT COMPANY and ABRAHAM B. CLARK, sole surviving mortgagee in trust, defendants.

It appearing to the court * * * that the amount of state indebtedness, so-called, including principal and interest, is about the sum of $206,000; that the total amount of the indebtedness of the defendant, the Fox and Wisconsin Improvement Company, which is secured by the mortgage or trust deed set out in said complaint and is properly a lien or charge upon the premises, property, franchises, rights, etc., covered by said mortgage or trust deed, and which is now matured and payable, including state indebtedness and not including the cost of completing the work as hereinafter stated, is about and does not greatly, if at all, exceed the sum of nine hundred and twenty-two thousand dollars;

That the total amount of indebtedness of the said company, secured as aforesaid, and properly a lien or charge as aforesaid, and which is unmatured, is about and does not greatly, if at all, exceed the sum of eleven hundred and eighty-eight thousand dollars;

That the amount necessary to be retained by the trustees as plaintiffs, in order to complete the works in manner as by law required, will be sixty thousand dollars. The unsecured indebtedness is about seventy-three thousand dollars.

(Schedules A to F describe different classes of lands.)

That Schedule G to said report annexed, and to which reference is here made, gives a statement of the water-powers mentioned in said mortgage and deed of trust, and gives a description of the same, the names of the parties to whom leased, the annual rent paid for same and the time which such leases have yet to run;

(Schedule H describes another class of lands.)

That Schedule K to said report annexed, and to which reference is here made, gives a statement of the property in whole or in greater part appurtenant to or connected with the works of improvement and of value, chiefly in connection with same, and which, in the opinion of the referee, should be sold with and as a part of the same: * * *

That the trustees, the plaintiffs, are advised and directed to cause sale to be made of all the lands, rights and interests in or claims upon or to lands granted by congress in aid of the Fox and Wisconsin rivers improvement, the water-powers, works of improvement, corporated rights, franchises, privileges, and all property covered by said trust deed and the mortgage set out in said complaint, unless prior to such sale the defendant, the Fox and Wisconsin Improvement Company, shall cause to be paid all indebtedness and obligations of said company now due and a charge upon said works, lands, etc., and the costs and expenses of this action." * * *

Dated February 4, 1864.

By the Court,

DAVID TAYLOR, Judge.

REPORT OF SALE.

Thereafter and on 28th of May, 1866, the trustees named in trust deed filed their report of sale.

(Title of cause.)

To the Circuit Court for the County of Fond du Lac:

* * *

(Here follows recital from the judgment.)

And we, the said trustees and referees, do further certify

and report that all of the said lands, water-powers, corporate rights and property, etc., to wit: All of the same embraced in the fourteen (14) schedules next hereinafter referred to, and which are hereto annexed and made a part of this report, and respectively numbered from one (1) to fourteen (14), both inclusive, were offered for sale and were sold in the order in which the said schedules are numbered, beginning with Schedule No. one (1), and as to parcels in the order respectively in which the parcels of lands, water-powers, corporate rights, property, etc., are stated in each of said schedules, beginning with the parcels first named in each of said schedules. * * * That all of the said lands partitioned and selected, etc., as aforesaid, together with all claims to lands not selected, partitioned or approved, were first sold, and the proceeds of same were found insufficient to complete the intended works of improvement, pay all the evidences of state indebtedness and interest thereon, and redeem all the bonds and other obligations of said company.

That thereupon in compliance with the provisions of the said trust deed, 'the water-powers created by said improvements' were sold, and the proceeds of the sale of same were together with the said proceeds of the sale of lands insufficient for the purposes aforesaid. That thereupon, in further compliance with the provisions of said deed of trust, the corporated rights, privileges, franchises and property of said company in said improvement and all appurtenances thereto were sold, and the proceeds of the sale of same, together with the proceeds before mentioned, were applied as stated in this report, and the exhibits and schedules hereto annexed, which said order of sale fully appears from said schedules.

And we, the said trustees and referees, do further certify and report." * * *

(It appearing that separate schedules covered the water-powers and the leases of water-powers, and that they were sold separately, the water-powers from the leases.)

That the total amount of the proceeds of the sale of all of the property embraced in the aforesaid fourteen schedules is the sum of four hundred and eight thousand six hundred and forty-six and 71–100 dollars ($408,646.71).

And we, the said trustees and referees, do further certify and report that thereupon on the said sixth day of February, A. D. 1866, after the total amount of the proceeds of the sale of the property described in the fourteen schedules aforesaid had been ascertained, we did publicly announce and declare in substance that the said proceeds of sale were sufficient in amount to comply with the conditions contained in the said

judgment of sale in order to render the sale valid, and that the sale of said property so made was valid and thereupon the said proceedings of sale concluded.

* * *

All of which is respectfully submitted.

CHARLES BUTLER,
ALEXANDER SPAULDING,
MOSES M. DAVIS,
Trustees and Referees for Sale.

CHAPTER 535, GENERAL LAWS OF WISCONSIN, 1865.

AN ACT relating to the sale of lands and other property of the Fox and Wisconsin Improvement Company, to extend the time for the completion of the works of the Fox and Wisconsin river improvement, and amendatory of section two of chapter 289 of the general laws of 1860 (1861).

The people, etc., do enact as follows:

Sec. 1. * * *

Sec. 2. * * *

Sec. 3. The provisions of this act and the act hereby amended, approved April 13, 1861, shall apply to any sale of the lands, property, franchises, etc., covered by the deed of trust executed under said act, approved October 3, 1856, which shall be made by said trustees in pursuance of the provisions of the said deed of trust, or in pursuance of any duly recorded judgment or order of court based wholly or in part upon said deed of trust.

* * *

Approved April 10, 1865.

CHAPTER 572, PRIVATE AND LOCAL LAWS OF WISCONSIN, 1866.

AN ACT in relation to the sale of the lands and property of the Fox and Wisconsin Improvement Company, to the time for completing said improvement, and to the improvement of the Wisconsin and other rivers and waters.

The people, etc., do enact as follows:

Sec. 1. In case the purchasers of the lands, works of improvement and other property of the Fox and Wisconsin Improvement Company, at the sale thereof made by the trustees of said Fox and Wisconsin Improvement Company, in the month of February, 1866, shall, pursuant to the provisions of chapter 289 of the general laws of 1861, as amended by chapter 535 of the general laws of 1865, form a corpora-

tion for the purpose of holding, selling, operating or managing the lands, water-powers, works of improvement, franchises and other property purchased at said sale, or any portion thereof, the said purchasers shall, in the certificate to be filed by them in the office of the secretary of state, specify what portions of the said property so purchased is to be held, owned and managed by said corporation; and it shall be lawful for said corporation to make such division, partition and conveyance of all or any of the lands so purchased among the corporators or their assigns, as they may determine; provided, that nothing in this section contained shall be taken or construed as a declaration of the character or extent of the interest acquired by the purchasers at said sale, or a recognition of its regularity or validity, or as placing a construction upon any act of congress or of the legislature of Wisconsin heretofore passed.

* * *

Sec. 3. The said corporation shall have power to enlarge and increase the capacity of said works and of the said rivers so as to make a uniform steamship navigation from the Mississippi river to Green Bay, or to surrender the same to the United States for such enlargement, on such terms as may be approved by the governor for the time being of the state.

* * *

Approved April 12, 1866."

ACT OF CONGRESS, CHAPTER CCX, LAWS 1870.

AN ACT for the improvement of water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers.

Be it enacted, etc., that the secretary of war is hereby authorized to adopt for the improvement of the navigation of the Wisconsin such plan as may be recommended by the chief of the bureau of engineers.

Sec. 2. And be it further enacted that the secretary aforesaid is hereby authorized to ascertain at any time he shall deem proper within three years from the passage of this act, the sum which in justice ought to be paid to the Green Bay & Mississippi Canal Company, a corporation existing under the laws of Wisconsin, as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid, and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of the same as shall, in the judgment of said secretary, be

needed; and to that end is authorized to join with said company in appointing a board of disinterested and impartial arbitrators, one of whom shall be selected by the secretary aforesaid, another by said company, and the third by the two arbitrators so selected. The secretary aforesaid is authorized to employ a competent agent or attorney to represent the interests of the United States upon the hearing before such board; provided, that in making their award the said arbitrators shall take into consideration, the amount of money realized from the sale of lands heretofore granted by congress to the state of Wisconsin to aid in the construction of said water communication, which amount shall be deducted from the actual value thereof as found by said arbitrators.

Sec. 3. And be it further enacted, that no money shall be expended on the improvement of the Fox and Wisconsin rivers, until the Green Bay & Mississippi Canal Company shall make and file with the secretary of war an agreement in writing, whereby it shall agree to grant and convey to the United States the property and franchise mentioned in the foregoing section, upon the terms awarded by the arbitrators. It is hereby made the duty of the secretary of war to transmit to congress a copy of the report of the arbitrators, upon which congress may, at its then present session, elect to take such property upon making an appropriation to pay the amount awarded; provided, that if the secretary of war shall not transmit to congress a copy of the report of the arbitrators at least sixty days before the close of its session, congress may, at its next session, make such election and appropriation.

Sec. 4. And be it further enacted, that all tolls and revenues derived from the improvement made or acquired under the provisions of this act, after providing for the current expenses of operating and keeping the same in repair, shall be paid into the treasury of the United States; and whenever the United States shall be reimbursed for all sums advanced for the same, with interest thereon, then the tolls aforesaid shall be reduced to the least sum which, together with other revenues properly applicable thereto, if any, shall be sufficient to operate and keep the improvements in repair.

Sec. 5. And be it further enacted, that the secretary of war shall annually report to congress the progress made in the completion of said improvements; the amount expended thereon; the amount, if any, required for the succeeding fiscal year, and the amount of revenue derived therefrom.

Approved July 7, 1870.

CHAPTER 416, GENERAL LAWS OF WISCONSIN, 1871.

AN ACT to authorize the directors of the Green Bay & Mississippi Canal Company to sell and dispose of the rights and property of said company to the United States.

The people, etc., do enact as follows:

Sec. 1. The directors of the Green Bay & Mississippi Canal Company, or a majority of them, are hereby authorized and empowered to sell and dispose of the rights and property of said company to the United States, and to make agreements therefor, and to cause to be made and executed all papers and writings necessary thereto as contemplated in the act of congress, approved July 7, 1870, entitled 'An act for the improvement of water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers.'

Sec. 2. This act shall take effect from and after its passage and publication.

Approved March 23, 1871.

REPORT OF ARBITRATORS TO SECRETARY OF WAR.

Sir: The board of arbitrators selected under the act of congress, approved July 7, 1870, entitled 'An act for the improvement of water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers,' composed of William Larrabee, of Iowa, selected by the secretary of war; James R. Doolittle, of Wisconsin, selected by the Green Bay & Mississippi Canal Company, and Paul Dillingham, of Vermont, named and selected as the third member of such board, submit the following report:

* * *

But the question of greatest difficulty and responsibility for the board to decide has been the question of value; to ascertain the true rule of compensation under the second section of the act, which is as follows:

'Sec. 2. And be it further enacted, that the secretary aforesaid is hereby authorized to ascertain, at any time he shall deem proper, within three years from the passage of this act, the sum which ought in justice to be paid to the Green Bay & Mississippi Canal Company, a corporation existing under the laws of Wisconsin, as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of the same as shall, in the judgment of said secretary, be needed, and to that end is authorized to join with said company in appointing a board of disinterested and impartial arbitrators, one of whom shall be selected by the sec-

retary aforesaid, another by said company, and the third by the two arbitrators so selected. The secretary aforesaid is authorized to employ a competent agent or attorney to represent the interests of the United States upon the hearing before such board: Provided, that in making their award, the said arbitrators shall take into consideration the amount of money realized from the sale of lands heretofore granted by congress to the state of Wisconsin to aid in the construction of said water communication, which amount shall be deducted from the actual value thereof, as found by said arbitrators.'

What is meant by 'the sum which ought, in justice to be paid,' mentioned in the body of the section, and 'the actual value,' mentioned in the *proviso*, from which the net proceeds of the lands granted are to be deducted?

Actual value to whom?

Value for what purpose?

These questions are not entirely free from doubt.

If considered as a pecuniary investment, in its present condition the property is of little actual value to the Canal Company, or to any other party. It pays but little revenue. Its revenues do not, in fact, pay expenses and repairs.

While it may be of very great value to the state, it has, for many years, been a source of expense to its proprietors. As a water-channel it has and can have no value, therefore, except in the future, by becoming a part of a great through water-route between the Mississippi river and Lake Michigan — a route, if once completed, of incalculable value to the people of all the states east and west.

And it is in view of the fact that congress may determine to take hold of that work as a matter of national importance, that this board is called upon to act and determine its value.

If congress elects to take the improvement of the company, it is for the purpose of making it a part of that through route, and for that purpose only. After hearing the parties, and considering this question in all its bearings, the board are of opinion that the true question to determine is, what is the value of the improvement to the government when taken for the purpose of making the same a part of a through route from Lake Michigan to the Mississippi river? Congress, of course, does not desire to take it as a money investment, but to make it a part of a national highway of commerce; and therefore it would seem to be worth as much as it would cost to build such works at the present time, deducting a reasonable sum for depreciation by wear and decay.

A large amount of testimony has been produced by the attorney of the company to show what would be the probable amount of business upon this route when completed through to the Mississippi. The board is satisfied, from the

testimony, that it would be very considerable; but that that rule of estimating its present value is too remote, contingent and speculative to be applied by this board. It depends upon contingencies which may never happen; upon legislation by congress and by the state; upon the expenditure of large sums of money, which neither congress nor the state would feel authorized to make, or which the company itself would be unwilling or unable to make. It depends, also, upon the competition of railroads which cross it at every important point, and upon the course of trade and business; and it is also seriously affected by the fact that, under the existing laws, tolls are collectible on the locks, and not uniformly on the whole line of the improved channels of the rivers, and that the principal amount of lockage is below Lake Winnebago, from which to Lake Michigan there are several competing railroads already in existence and in process of construction. While such water-route will be of inestimable value to regulate and to reduce the price of transportation, all these contingencies and events, yet unrealized, lead the board back to the conclusion to base their judgment upon its actual value, as a thing in existence, proposed to be taken by congress to be made a part of a through channel of water communication, and which is, in fact, worth just what it would save to the government in the expenditure necessary to make it if it were not already made. In other words, it is worth what it would cost congress to build it anew, subject to the depreciation by wear and by time. The board are strengthened in this view from the fact that, in the *proviso*, congress, in proposing to take the work, proposes to apply toward that actual value, or, as it seems to the board, what it would cost to build it, the amount heretofore contributed by the government for that purpose.

In this view of the case the board have arrived at a determination of this question, after long conference and balancing of opinion, upon the questions of value, cost and depreciation, and have agreed to report that they find the value, for the purpose above mentioned, of 'all and singular the property and rights of property of the Green Bay & Mississippi Canal Company, in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals and franchises; and including as fixtures, attending the operation and repair of the same, the dredge-boats, dump-scows and all other articles of personal property mentioned in the list of personal property annexed to the testimony of B. J. Stevens, Esq., in the appendix hereto annexed, to be $1,048,070, and that the amount of money realized from the sale of

lands heretofore granted by congress to the state of Wisconsin to aid in the construction of said water communication, to be deducted from such actual value, is $723,070, leaving a balance of $325,000 to be paid to the Green Bay & Mississippi Canal Company; and whereas, under the said act, the secretary of war may, in his judgment, decide that such personal property may not be needed, and that a part of the franchises of the Canal Company, viz., the water-powers created by the dams and by the use of the surplus waters not required for purposes of navigation, are not needed, and in order to enable said secretary to pass judgment upon those questions, this board have thought proper to appraise the value thereof respectively.

They estimate and appraise the value of such water-powers, and lots necessary to the enjoyment of the same, subject to all rights to use the water for all purposes of navigation, as the same is reserved in all leases made by said company, and subject also to all leases, grants and assignments made by said company, at the sum of $140,000, which said sum is to be deducted from the said sum of $325,000 in case the said secretary or congress shall determine that the said water-powers are not needed for public use; they also estimate and appraise the said dredge-boats and other personal property mentioned in said list at the sum of $40,000, which said sum is to be deducted from said sum of $325,000 in case said secretary or congress shall decide that the same are not needed for public use.

* * *

Dated Milwaukee, November 15, 1871.

J. R. DOOLITTLE, Chairman.
WM. LARRABEE.
PAUL DILLINGHAM.

Hon. W. W. BELKNAP, Secretary of War.

* * *

WASHINGTON, D. C., February 26, 1872.

General: I have the honor to report that I have examined the report of the board of arbitrators on the improvement of the Fox river, Wisconsin, selected under the act of congress, approved July 7, 1870, * * *

The arbitrators report the total value of all property, etc., to be $1,048,070 and that the amount realized from the sale of public lands is $723,070, leaving a balance of $325,000 to be paid for all the property and franchises of the company.

They also report separately the value of a portion of the franchises of said company, viz.: 'The water-powers created

by the dams and surplus water not required for purposes of navigation,' to be $140,000, and the value of certain personal property to be $40,000. These amounts are to be deducted from the $325,000 in case the water-powers and personal property are not required.

Does the government need this water-power for the purposes contemplated in the act of congress, viz., the improvement of this line of navigation? The water-power for which the award is made is a limited franchise, as stated in the award of the board, and is 'subject to all rights to use the water for all purposes of navigation.' It consists of certain water lots, indicated in the map accompanying the report, and the right to use the water-power created by the dams in those lots. This water-power is estimated to be equal to 14,000 horse-power, distributed as follows, according to the testimony of Morgan L. Martin, upon whose evidence the award seems to be based: (See page, 13, testimony on water-power.)

At Appleton, 5,000 horse-power; at Cedars, 1,000 horse-power; at Little Chute, 2,500 horse-power; at Kaukauna, 2,500 horse-power; at Rapid Croche, 1,500 horse-power; at Little Kaukauna, 750 horse-power; at other points, 750 horse-power; in all, 14,000 horse-power.

From the testimony of A. L. Smith (see page 1, same testimony) it appears that about 2,000 of this horse-power is leased. At the Portage canal, 50 horse-power; at Montello, 25 horse-power; at Appleton and other points in the lower Fox not clearly stated, amounts not to exceed in all 2,000 horse-power. The largest lease is at Appleton, to Smith & Co., 1,000 horse-power. These powers, including the lots, rent for about $2,200 per annum.

There remain, then, 12,000 horse-power not leased. In all leases of water-power the company has guarded itself against all claims for damages from any cause. (See forms of lease.) This water-power does not comprise all the water-power furnished by the river, nor all the power which is made available by the dams and canals of the company. To render all of this latter power available would require the construction of new feeders and the purchase of land, but this is not included in the award.

There is an immense water-power in the lower Fox, entirely independent of the works of improvement, part of which has been made available by works of private parties. If the government should decide not to purchase this water-power, it would leave the company in possession of this water-power, estimated at 14,000 horse-power, and the right to use the surplus water in their own lots. The additional

water-power created by the present works of improvement, and such as might be created in future by works for further improvement, would be entirely under the control of the government.

* * *

I am, general, very respectfully, your obedient servant,

D. C. HOUSTON,
Major Engineers.

Brigadier General A. A. HUMPHREYS,
Chief of Engineers, U. S. Army, Washington, D. C.

REPORT OF THE SECRETARY OF WAR.

WAR DEPARTMENT,
Washington City, March 3, 1872.

The secretary of war has the honor to transmit herewith to the house of representatives the report of the arbitrators selected under the act of congress, approved July 7, 1870.

* * *

The secretary is of opinion that the personal property appraised by said arbitrators at $40,000 is not needed for public use. He is further of opinion that the franchises of said corporation, that are appraised by said arbitrators at the sum of $140,000, are not required for purposes of navigation, and are therefore not needed. Deducting the above valuations of property, franchises, etc., which in the opinion of the secretary are not 'needed' within the meaning of that word, as used in said act, the valuation of the remaining property, franchises, etc., as found by said arbitrators, is $145,000. The secretary reports to congress that all the property, franchises, etc., so valued at $145,000, are needed for purposes of navigation, and that said amount of $145,000 is the sum which, in his opinion, ought in justice to be paid to said corporation as an equivalent for the transfer to the United States of said property, franchises, etc., so needed. In thus giving his opinion as to what part of said property, franchises, etc., is 'needed' within the meaning of said act, he submits that it is an important matter for consideration, should the government become a purchaser of any, whether it should not purchase all the franchises of said corporation.

Attention is called to the action of the arbitrators in this case subsequent to the making of their award. It is deemed proper to inform congress that it is reliably stated to the secretary that the Green Bay & Mississippi Canal Company

is dissatisfied with the foregoing award, and will contest its validity at law.

* * *

WM. W. BELKNAP,
Secretary of War.

CHAPTER CDXVI, ACT OF CONGRESS, 1872.

* * *

Be it enacted, etc., * * * that the following sums of money be and are hereby appropriated, to be paid out of any money in the treasury not otherwise appropriated, to be expended under the direction of the secretary of war, for repair, preservation and completion of the following public works hereinafter named:

* * *

For the payment to the Green Bay & Mississippi Canal Company for so much of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals and franchises, as were made under the act of congress for the improvement of water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers, approved July seventh, eighteen hundred and seventy, reported by the secretary of war to be needed, in his communication to the house of representatives, dated March eight, eighteen hundred and seventy-two, one hundred and forty-five thousand dollars.

* * *

Approved June 10, 1872.

ACT OF CONGRESS—17 STATUTES AT LARGE, 560.

March 3, 1873, an appropriation of $300,000 was made "for the improvement of the Fox and Wisconsin rivers."

ACT OF CONGRESS—18 STATUTES AT LARGE, 237.

June 23, 1874, an appropriation of $300,000 was made "for continuing the improvement of the Fox and Wisconsin rivers." * * *

ACT OF CONGRESS—18 STATUTES AT LARGE, 456.

March 3, 1875, an appropriation of $500,000 was made "for the improvement of the Fox and Wisconsin rivers."

ACT OF CONGRESS—CHAPTER 457, SESSION LAWS 1874.

* * *

Be it enacted * * * That the following sums of money be and are hereby appropriated * * *:

"For continuing the improvement of the Fox and Wisconsin rivers, three hundred dollars."

June 23, 1874.

ACT OF CONGRESS—CHAPTER 264, SESSION LAWS 1878.

* * *

Be it enacted * * * That the following sums of money be and are hereby appropriated: * * * for improving Fox and Wisconsin rivers, two hundred and fifty thousand dollars.

June 18, 1878.

ACT OF CONGRESS—CHAPTER 359, SESSION LAWS 1878.

* * *

Be it enacted * * * That the following sum be, and the same are, hereby appropriated for * * * payment of George F. Wheeler, Robert H. Hotchkiss and Aron Walters, for services rendered by them as commissioners appointed pursuant to an act of congress of March third, eighteen hundred and seventy-five, to appraise damages to lands in Fond du Lac county, Wisconsin, caused by the improvement of the Fox and Wisconsin rivers, five thousand three hundred and ten dollars.

June 20, 1878.

ACT OF CONGRESS—CHAPTER 166, SESSION LAWS 1875.

AN ACT to aid in the improvement of the Fox and Wisconsin rivers in the state of Wisconsin.

Be it enacted * * * that whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox rivers in the state of Wisconsin, it becomes necessary or proper in the judgment of the secretary of war to take possession of any lands or the right of way over any lands for canals and cut-offs, or to use any earth quarries or other material lying adjacent or near to the line of said improvement and needful for its prosecution or maintenance,

the officers in charge of said works may, in the name of the United States, take possession of and use the same after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the state wherein such property lies. In case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner. The department of justice shall represent the interests of the United States in legal proceedings under this act and for flowage damages hereinbefore occasioned.

Sec. 2. That a portion of the appropriation now made for the further prosecution of the improvement aforesaid not exceeding in amount twenty-five thousand dollars may be applied in payment for the property and rights taken and used as aforesaid.

Approved March 3, 1875.

Other appropriations were made by congress for the same general work, substantially as follows:

In 1879.....	$150,000	In 1888...	$126,949.73
In 1880.....	130,010	In 1890.....	256,552.70
In 1881.....	125,000	In 1892.....	184,022.33
In 1882.....	200,000	In 1893.....	39,985.50
In 1884.....	160,000	In 1894.....	43,763.34
In 1886.....	56,250	In 1896.....	40,500.

CHAPTER 320 — GENERAL LAWS OF WISCONSIN, 1881.

This act authorizes proceedings in the state courts in behalf of the United States to ascertain damages for lands overflowed and injured by the work of improvement, and supplements the aforesaid act of congress of March 3, 1875, and other like laws on the part of the state, — chapter 291, Laws of 1874; chapter 119, Laws of 1872.

DEED—GREEN BAY & MISSISSIPPI CANAL COMPANY TO UNITED STATES OF AMERICA.

This indenture made this eighteenth day of September, in the year of our Lord, one thousand eight hundred and seventy-two, between the Green Bay and Mississippi Canal Company, a corporation existing under the laws of the state of Wisconsin, of the first part, and the United States of America, of the second part.

Whereas, in and by an act of congress entitled 'An act for the improvement of water communication between the Mississippi river and Lake Michigan, by the Wisconsin and Fox rivers,' approved July 7, 1870, to which reference is here made, the secretary of war was authorized to ascertain at any time he should deem proper, within three years from the passage of said act, the sum which ought in justice to be paid to the Green Bay and Mississippi Canal Company, a corporation existing under the laws of Wisconsin, as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of them as should in the judgment of said secretary be made, and to that end he was authorized to join with said company in appointing a board of disinterested and impartial arbitrators, one of whom should be selected by the secretary aforesaid, another by said company, and the third by the two arbitrators so selected.

And whereas, a board of arbitrators duly constituted and acting under and pursuant to said act of congress did duly find and report, to the said secretary of war by their report, in writing, bearing date on the fifteenth day of November, eighteen hundred and seventy-one, that the sum which in justice ought to be paid to said company as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication aforesaid, including its locks, dams, canals and franchises, was the sum of three hundred and twenty-five thousand dollars; and did further find and report that, whereas, under the act of congress aforesaid, the secretary of war might in his judgment decide that the personal property of said company might not be needed, and that a part of the franchises of said company, viz.: the water-powers created by the dams and by the use of the surplus waters not required for purposes of navigation, might not be needed, the value of such personal property was the sum of forty thousand dollars,

and the value of such water-power and lots necessary to the enjoyment of the same, subject to all rights to use the waters for purposes of navigation, as the same is reserved in all leases made by said company, and subject also to all leases, grants and assignments made by said company, was the sum of one hundred and forty thousand dollars, which said sum was to be deducted from the said sum of three hundred and twenty-five thousand dollars, in case the said secretary or congress should determine that said water-powers were not needed for public use, and which said sum of forty thousand dollars should also be deducted from said sum of three hundred and twenty-five thousand dollars in case said secretary or congress should determine that the said personal property was not needed for public use.

And whereas, the said secretary of war did, pursuant to said act of congress, duly make his report in writing to congress, bearing date on the 8th day of March, A. D. 1872, wherein and whereby he did, among other things, report in substance as follows, to wit:

The secretary is of the opinion that the personal property appraised by said arbitrators at forty thousand dollars is not needed for public use.

He is further of opinion that the franchises of said corporation, that are appraised by said arbitrators at the sum of one hundred and forty thousand dollars, are not required for the purposes of navigation, and are therefore not needed. Deducting the above valuations of property, franchises, etc., which, in the opinion of the secretary, are not "needed" within the meaning of that word as used in said act, the valuations of the remaining property, franchises, etc., as found by said arbitrators, is one hundred and forty-five thousand dollars. The secretary reports to congress that all the property, franchises, etc., so valued at one hundred and forty-five thousand dollars are needed for purposes of navigation, and that said amount of one hundred and forty-five thousand dollars is the sum which, in his opinion, ought in justice to be paid to such corporation as an equivalent for the transfer to the United States of said property, franchises, etc., so needed.

And whereas, under and by an act of congress entitled "An act making appropriations for the repair, preservation and completion of certain public works on rivers and harbors and for other purposes," approved the **10th* day of **June*, A. D. 1872, congress, at its then present session, did

*[The words "10th" and "June" appear on the record in pencil, apparently inserted *after* instrument was recorded.— *Register.*]

duly elect to take such property, by making an appropriation to pay the amount awarded, in the following language, to wit: "For payment to the Green Bay and Mississippi Canal Company for so much of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of Fox river, including its locks, dams, canals, and franchises, as were, under the act of congress for the improvement of water communication between the Mississippi river and Lake 'Michigan,' by the Wisconsin and Fox rivers, approved July seventh, eighteen hundred and seventy, reported by the secretary of war to be needed, in his communication to the house of representatives, dated March eighth, eighteen hundred and seventy-two, one hundred and forty-five thousand dollars."

Now, therefore, this indenture witnesseth, that in consideration of the premises, and fully to comply with the requirements of the said act of congress, approved July seventh, eighteen hundred and seventy, and to accomplish the intents and purposes thereof, and in consideration of the sum of *one hundred and forty-five thousand dollars*, paid by the United States of America, the said party of the second part, the receipt whereof is hereby acknowledged, the Green Bay and Mississippi Canal Company, the said party of the first part, hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said, the United States of America, the party of the second part, the following described property, rights, franchises, etc., situated in the state of Wisconsin, and described as follows, to wit: All and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises, *saving* and *excepting* therefrom, and *reserving* to the said party of the first part, the following described property, rights and portion of franchises, which, in the opinion of the secretary of war, and of congress, are not needed for public use, to wit:

First — All of the personal property of the said company, and particularly of all such property described in the list or schedule attached to the report of said arbitrators, and now on file in the office of the secretary of war, to which reference is here made, whether or not such property be appurtenant to said line of water communication.

Second — Also all that part of the franchise of said company, viz.: the water-powers created by the dams, and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation

appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation as the same is reserved in lease heretofore made by said company, a blank form of which attached to the said report of said arbitrators is now on file in the office of the secretary of war, and to which reference is here made, and subject also to all leases, grants and assignment made by said company; the said leases, etc., being also reserved therefrom.

Together with all and singular the hereditaments and appurtenances unto the above granted and described property, rights and franchises not so saved, excepted or reserved belonging or in any wise appertaining, and all the estate, right, title, interest, claim or demand whatsoever, of the said party of the first part, either in law or equity, either in possession or expectancy of, in and to the above granted property, rights and franchises, not so saved, excepted or reserved and their hereditaments and appurtenances.

To have and to hold the above granted and described property, rights and franchise not saved, excepted or reserved as aforesaid and every part and parcel thereof, together with the hereditaments and appurtenances thereunto belonging, unto the said United States of America, party to second part, its successors and assigns forever.

In witness whereof, the party of the first part hath hereunto caused its corporate seal to be affixed, and these presents to be subscribed by its president, and attested by its assistant secretary, *pro tempore*, on the day of the date of these presents.

[Corporate Seal of G. B. & Miss. Canal Co.]

SAMUEL MARSH,
President of the Green Bay & Mississippi Canal Company.

Attest: HENRY C. BLAKE,
Assistant Secretary *pro tempore* of Green Bay & Mississippi Canal Company.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 190.

GREEN BAY & MISSISSIPPI CANAL COMPANY,

Plaintiff in Error,

vs.

PATTEN PAPER COMPANY (LIMITED), UNION PULP COMPANY, FOX RIVER PULP AND PAPER COMPANY, KAUKAUNA WATER POWER COMPANY, MATTHEW J. MEADE, HARRIET S. EDWARDS, MICHAEL A. HUNT, ANNA HUNT, HENRY HEWITT, JR., AUG. L. SMITH, KAUKAUNA PAPER COMPANY, AMERICAN PULP COMPANY, W. P. HEWITT, ET AL.,

Defendants in Error.

BRIEF ON BEHALF OF GREEN BAY AND MISSISSIPPI CANAL COMPANY, PLAINTIFF IN ERROR, BY MR. MARINER.

STATEMENT OF FACTS.

The original complaint is by the Patten Paper Company as plaintiff, which as tenant in common with the plaintiff and others is a user of water power from the pond in the middle channel of the river, as shown upon the accompanying map, which is a reduced copy of the Patten Paper Co.'s exhibit A 1. This pond is down stream from the mills of the tenants of the Canal Company and is substantially on the level of the tail races of those mills.

In its complaint it alleges that the Canal Company is the owner of the north bank of the river, and the owner for water power purposes of the canal from the pond down to the first lock, and that it has been accustomed to draw and is continually drawing from the pond through the canal and the mills of its tenants, and discharging the same into the north channel of the river, so that it can not come into the middle channel, a quantity of water equal to one-half of the flow of the river, and the half appurtenant to the north bank of the river.

It also alleges that the accustomed flow of the north channel, below the middle channel, in a state of nature, before any improvements were made, was one-half the entire flow of the river.

That in a state of nature one-third of the flow of the river ran in the middle channel.

That the Kaukauna Water Power Company was the owner of the south bank of the river from above the upper dam to the foot of the rapid and the owner of the south bank of the south channel. That the flow of the south channel was one-sixth of the flow of the river, and that the Kaukauna Water Power Company had constructed a canal from the upper pond along the south shore parallel to the river, and was drawing and threatened to continue drawing through said canal from the upper pond one-half of the flow of the river and discharge it into the south channel, so that it could not come into the middle channel, by reason whereof the middle channel was unlawfully deprived of the one-third of the water which in a state of nature flowed into that channel.

The Kaukauna Water Power Company answered the complaint, denied that the middle channel was entitled to more than one-sixth of the flow of the river, and denied that the Canal Company was entitled to more than one-third of the flow of the river, and claimed that the Water Power Company was the owner of the south bank of the river and of the south channel, and as such was entitled to draw from the pond one-half of

the flow of the river and pass it through its canal and the mills of its tenants, so that it could not come into the middle channel.

The Canal Company answered the complaint, admitting substantially the allegations of fact of the complaint.

Up to this time no claim was made to the water power not founded upon riparian ownership.

But the Canal Company filed a cross-complaint, in which it set up its title as grantee of the State and the Improvement Company to the whole flow of the river, under the United States and the State, by reason of having constructed the dam and canal, under certain acts of Congress and of the Legislature of the State, which title, for want of a better name, I will call, by right of sovereignty. It prayed upon said allegations that it be adjudged the owner of the whole water power of the river, but admitted that so much of the flow of the river *as it permitted to flow over the dam* might be divided between the several channels. (Record, p. 101.)

The allegations of the Canal Company in its cross-complaint were put in issue and proofs taken and the case went to trial. The Superior Court was of the opinion that the decision of this Court in 142 U. S., 254, ruled the case, and rendered judgment in favor of the Canal Company, which sustained the allegations of the cross-complaint to the full extent (page 194 Record), and followed the prayer of the cross-complaint and adjudged, among other things, that

"The Green Bay and Mississippi Canal Company is the owner of and entitled as against all of the parties to this action, and their successors, heirs and assigns, to the full flow of the river not necessary to navigation,* * * * * * and, second, adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay and Mississippi Canal Company in so withdrawing and using such water.

"Third. It is further considered and adjudged and decreed as in favor of the Patten Paper Company against all the other defendants, that all of the water of the river *which is permitted by the Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4*, so as to pass down the river, should be and it is hereby divided and apportioned

between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns, and the Green Bay and Mississippi Canal Company and its successors and assigns, between and to the south, middle and north channels of the river in the following proportions," which are the proportions hereinafter set forth.

There was nothing in this judgment alluding to or determining any of the issues raised on the original complaint and answers. No allegation in that complaint and answers had been considered by the Superior Court. That Court had considered only whether the rights of sovereignty claimed by the Canal Company in its cross-complaint were well founded in law and paramount to the riparian rights set out in the complaint and the answers thereto, and had determined that they were. No allegation of the original complaint and answers had found a place in the judgment except the allegation touching the proportions of water which flowed by nature in the several channels of the river, and that allegation found place in the judgment so far only as it had application to the *water which the Canal Company permitted to flow over the dam*, because to that extent it had also its place in the cross-complaint, which prayed that the water which the Canal Company *permitted to flow over the dam* should be divided between the respective channels in the proportions in which the waters of the river flowed in a state of nature.

If that judgment should be reversed, the original pleadings would remain before the Court as they stood before the filing of the cross-complaint, as the basis upon which the riparian rights of the parties set out in the complaint and the answers thereto should be adjudged.

When this judgment was rendered the defendants in error might under the statute appeal from the whole judgment, and so bring the whole case within the jurisdiction of the Supreme Court, or they might appeal from a part of the judgment and so bring to that Court only the part appealed from. They chose the latter course, and appealed from that part of the judgment only which gave to the Canal Company all the water

power on the river, and that part which limited the division of the water between the channels to that part of the river which the Canal Company should permit to flow over the dam. (Record, pp. 532, 533, 535.)

The Supreme Court reversed the judgment so rendered by the Superior Court, and remanded the case to the Superior Court with directions to enter judgment in accordance with its opinion, *instead of remanding the case to the Superior Court for further proceedings according to law.*

That Court, in obedience to the mandate of the Supreme Court, without any trial, and undertaking to act in strict obedience of the mandate for its authority to proceed, entered final judgment in the case, which appears at page 554 of the record.

After the recitals of the appeals from the former judgment, the reversal of that judgment and the mandate of the Supreme Court as the warrant for the judgment, it proceeds:

"First. Upon motion of Hooper & Hooper, plaintiff's attorneys, it is considered adjudged and decreed as in favor of the Patten Paper Company (limited), Union Pulp Company and Fox River Pulp and Paper Company against all defendants, that all the water of the river except that required for purposes of navigation, shall be and is hereby divided and apportioned between and to the south, middle and north channels of the river in the following proportions, that is to say: 43-200 thereof of right should flow down the south channel, 157-200 thereof should of right flow down the main channel of the river, north of Island No. 4, and that of the water so of right flowing down the main channel of the river, north of Island No. 4, and above the middle channel, 62-157 thereof should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the north channel and north of Island No. 3, and each of the parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid."

"Third. And it is further adjudged by the Court that said Green Bay and Mississippi Canal Company, its successors and assigns, shall so use the water, if at all, created by said dam, as

that all the water used for water power or hydraulic purposes shall be returned to the stream in such a manner and at such a place as not to deprive the appellants or those claiming under or through them of its use as it had been accustomed to flow past the lands of the said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants shall have the right to use the water of said river, except such as is or may be necessary for navigation, as it was wont to run in a state of nature, without material alteration or diminution."

From which judgment the plaintiff appealed to the Supreme Court of the State, by its appeal, page 571 of the record, and on the 10th of January, 1896, the respondents, who are the defendants in error, moved to dismiss said appeal for the reasons that the judgment was in exact accord with the mandate and was in effect the judgment of the Supreme Court, which motion appears at page 576 of the record, and upon such motion the appeal was dismissed by the Court, by order found at page 578 of the record, upon the grounds stated in the opinion, page 580, as follows:

"After careful consideration we are constrained to hold that the judgment entered is a substantial compliance with the mandate of this Court. Certainly it would have been improper to allow any amendment to pleadings or new litigation. The mandate was not for a new trial, nor for further proceedings according to law, but with direction to enter judgment in accordance with the opinion, and the opinion left nothing undetermined. This left nothing for the trial Court to do in the case, except to enter judgment therein as directed."

By that appeal and its decision the jurisdiction of the State Courts in this case was exhausted, and the judgment of the Superior Court became the final judgment of the highest Court in the State in which a decision in the suit could be had.

THE FEDERAL QUESTION.

"Sec. 709. A final judgment, in the highest Court of a State, in which a decision in the suit could be had, * * * *where is drawn in question* the validity of * * * an authority *exercised* (that is, the validity of the exercise of an authority) under any State, on the ground of their being repugnant to the constitution of the United States, and the decision is in favor

of their validity (that is, in favor of the validity of the exercise of an authority under the State), may be examined and reversed or affirmed in the Supreme Court upon a writ of error."

The making of a judicial order always calls in question the jurisdiction of the Court. If the Court has jurisdiction the order may be right. If the Court has not jurisdiction the order must be wrong. The Supreme Court could not have made these mandates in the first instance, without determining that it had jurisdiction to make them, nor could the Superior Court enter judgment in obedience thereto without considering the jurisdiction of the Supreme Court to make the mandates and its own jurisdictions in virtue thereof to enter the judgment.

POINTS.

I.

The Supreme Court of the State took but a limited jurisdiction of the case by the notices of appeal. It exceeded that jurisdiction and assumed to exercise and did exercise full jurisdiction of the case when it required the Superior Court by its mandates to enter judgment according to the opinion of the Supreme Court. Its judgment and mandates in that regard, to the extent that they exceed the jurisdiction of the Court, are not due process of law.

II.

The judgment of the Superior Court entered in obedience to those mandates of the Supreme Court as its authority *and without any trial or other authority than the mandates*, to the extent that those mandates exceeded the jurisdiction of that Court, was not due process of law.

III.

That judgment took away the property of the Canal Company, viz: the right to draw the surplus water of the river appurtenant to the north bank of the river, from the pond,

through the canal, and through the mills of its tenants, for water power, without due process of law, and is therefore repugnant to the constitution of the United States.

IV.

The judgment of the Superior Court to the extent that it took away the right of the Canal Company to draw the surplus water appurtenant to the north bank of the river from the pond through the canal and the mills of its tenants, is contrary to the pleadings; there are no pleadings to sustain it. It is therefore not due process of law, and inasmuch as it takes away the property of the plaintiff in error, it is repugnant to the constitution of the United States.

There are other points in the case which will be discussed by Mr. Vilas and Mr. Stevens, but I propose to discuss these only.

I.

The Supreme Court of the State took but a limited jurisdiction of the case under the notices of appeal. It exceeded that jurisdiction and assumed to exercise and did exercise full jurisdiction of the case, when it required the Superior Court by its mandates to that Court to enter judgment according to the opinion of the Supreme Court, and its judgment and mandates in that regard. To the extent that they exceeded the jurisdiction of the Court, this order and judgment are not due process of law.

If these appeals gave the Supreme Court full jurisdiction of the whole case, and it determined to reverse the judgment and deny the claim of the Canal Company to this water power made in its cross-complaint, it could at the same time consider, determine and adjudge the relative rights of the parties in and to the water power as riparian owners, as set out in the original complaint and answers thereto, and command the Superior Court to enter final judgment in accordance with its opinion.

But if these appeals gave jurisdiction to the Supreme Court only to consider and determine the matters appealed from, viz:

whether the Superior Court was right in determining that the Canal Company was entitled to the whole water power on this rapid, and that only the water which it permitted to flow over the dam should be divided agreeably to its claim in the cross-complaint, as adjudged by the Superior Court, then the Supreme Court would have jurisdiction only to reverse that judgment and remand the case to the Superior Court to consider, determine and adjudge the rights of the parties in the original complaint and the answers thereto, in conformity with the opinion of the Supreme Court.

The jurisdiction of the Supreme Court is derived from Sec. 2405 of the Revised Statutes, Sanborn & Berryman's Edition, which is in the following words:

"The Supreme Court shall have and exercise an appellate jurisdiction only, except when otherwise specially provided by law or the constitution, which shall extend to all matters of appeal, error or complaint from the decisions or judgments of any of the Circuit Courts, County Courts or other Courts of record, and shall extend to all questions of law which may arise in said Courts, upon a motion for a new trial, in arrest of judgment, or in cases reserved by said Courts."

So that in cases of this sort the Supreme Court has appellate jurisdiction only. Such jurisdiction is acquired only through the service of the notice of appeal provided by Section 3049 of the statute, which is in the words following:

"An appeal must be taken by serving a notice, in writing, signed by the appellant or his attorney, on the adverse party and on the clerk of the Court in which the judgment or order appealed from is entered, *stating the appeal from the same*, and *whether the appeal is from the whole or some part thereof*; and *if from a part only, specifying the part appealed from.* The appeal shall be deemed taken by the service of the notice of appeal, and perfected on service of the undertaking for costs or the deposit of money instead, or the waiver thereof, as hereinafter prescribed. When service of notice of appeal and undertaking can not, in any case, be made within this State, the Court may prescribe a mode of serving the same."

The power of the Supreme Court when an appeal has been taken is given by Section 3071 of the same statutes, so much of

which as is essential to this argument is in the words following:

"Upon an appeal from a judgment or order or upon a writ of error, the Supreme Court may reverse, affirm or modify the judgment or order, and as to any or all of the parties, and may, if necessary or proper, order a new trial; *and if the appeal is from the part of a judgment or order, may reverse, affirm or modify as to the part appealed from.* In all cases the Supreme Court shall remit its judgment or decision to the Court from which the appeal or writ of error was taken, to be enforced accordingly, and if from a judgment *final judgment shall thereupon be entered in the Court below, in accordance therewith*, except where otherwise ordered."

It will be seen by an examination of these sections:

(a) That the jurisdiction of the Supreme Court in this case is appellate purely.

(b) That its jurisdiction is derived from the service of the notice of appeal.

In Yates vs. Shepardson, 37 Wis., 315, the Court held that where a notice of appeal was served upon counsel, and none upon the clerk, but in place a stipulation was filed by the parties admitting service by each of notice on the other and waiving an undertaking, upon which the clerk of the lower Court remitted the record to the Supreme Court, that it did not thereby acquire jurisdiction, and dismissed an appeal on its own motion, after the case had been argued on its merits, and say:

"Cases can be brought by appeal to this Court only in the manner prescribed by statute (Laws 1860, Ch. 264, Sec. 3, which is Sec. 3049 S. & B. R. S.), which provides that a notice of appeal must be served on the adverse party and on the clerk of the proper Court. * * * Rule 3 requires the clerk to return the notice of appeal with the record to this Court. The plain object of this requirement is that the Court may see from the record that it has jurisdiction to review the judgment or order from which the appeal is taken."

Eureka Steam Heating Co. vs. Sloteman, 67 Wis., 118-125, in which the Court say:

"An appeal is not thus a mere gratuity or favor to be granted or withheld in the discretion of the trial Court, but an

absolute right, if exercised within the time and in the manner prescribed by the statute. *The wording of the notice of appeal must be left to the party appealing.*"

The first judgment is after the title as follows (page 194):

"It is hereby considered, adjudged and decreed that the defendant, The Green Bay and Mississippi Canal Company, is the owner of and entitled, as against all of the parties to this action, and their successors, heirs and assigns, to the full flow of the river not necessary for navigation, from the said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used wherever it may be available for water power, and is not obliged to permit any of the water from the river or pond to flow over said dam.

"And, second. It is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay and Mississippi Canal Company in so withdrawing and using such water.

"Third. It is further considered, adjudged and decreed, as in favor of the Patten Paper Company, against all the other defendants, that all of the water of the river *which is permitted by the Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4, so as to pass down the river*, should be, and it is hereby divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns, and the Green Bay and Mississippi Canal Company and its successors and assigns, between and to the south, middle and north channels of the river, in the following proportions, that is to say: 43-200 part of the water so permitted to flow down the river of right should flow down the south channel; 157-200 of the whole flow of the river so permitted to flow over the dam should of right flow down the main channel of the river, north of Island No. 4, and that of the water so permitted to flow down the main channel of the river, north of Island No. 4 and above the middle channel, 62-157 thereof should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel, north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down

the north channel and north of Island No. 3; and each of the parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so permitted to flow over the dam or into the river above Island No. 4 so as to prevent their flowing into said channels in the proportions aforesaid.

"Fourth. Nothing in this judgment contained shall in any wise conclude the Green Bay and Mississippi Canal Company from recovering against the Kaukauna Water Power Company compensation for water which it has heretofore drawn or shall hereafter withdraw from the pond created by said upper dam with the assent of the Green Bay and Mississippi Canal Company.

"Fifth. That the Green Bay and Mississippi Canal Company do have and recover of and from the Patten Paper Company (limited), the Union Pulp Company, and The Fox River Pulp and Paper Company, plaintiffs, and the Kaukauna Water Power Company, Henry Hewitt, Jr., and Wm. P. Hewitt, defendants, the sum of two hundred and fifty-eight and 90-100 dollars, as and for its costs and disbursements upon the issue made by its answer and its cross-complaint herein.

"Sixth. That the plaintiffs, The Patten Paper Company (limited), The Union Pulp Company and the Fox River Pulp and Paper Company, defendant, have and recover of and from the defendants, The Kaukauna Water Power Company, the sum of two hundred forty-nine and 44-100 dollars as and for its costs and disbursements upon the issues made by the complaint for the partition and division of the waters of the Fox river.

Dated January 19, 1894.

By the Court,

R. N. AUSTIN, Judge."

It is to be noted that there is nothing in this judgment which determines any of the issues arising upon the original pleadings as to riparian rights, and nothing in it not necessary to the determining the issues raised by the cross-complaint between the Canal Company claiming under rights of sovereignty as opposed to the defendants in error claiming as riparian proprietors. The Superior Court merely sustained our claim to the whole water power under what we call rights of sovereignty, and by that determination the riparian rights were *superseded*. No

consideration was given to the claims of the various riparian owners as between themselves, and especially no consideration or determination was had of the right of the Canal Company *as riparian owner only*, to draw the water from the pond through the Canal at the level of the pond and use it in the mills of its tenants; *provided the rights of sovereignty which it claimed were denied by the Supreme Court.*

From that judgment there were three appeals by the defendants in error substantially alike. Each of the appeals is from parts of the judgment only. All of them appeal from the first clause of the judgment, which gives the Canal Company all the water power on the rapid; from the second clause, which enjoins all of the defendants from interfering with the right of the Canal Company so given; from so much of the third clause as limits the division of the water power to the water which the Green Bay and Mississippi Canal Company permits to flow over the upper dam and into the river above Island No. 4. None of them appeal from the fourth section, which provides that nothing in this judgment shall conclude the Canal Company from recovering against the Kaukauna Water Power Company compensation for water it may have used. All the defendants in error appeal from the fifth section, which adjudges costs against them, and none of them appeal from the sixth clause, which gives the Patten Company judgment for costs against the Kaukauna Water Power Company. See appeals, pages 532-536.

It is evident, therefore, that none of the defendants intended to give the Supreme Court full jurisdiction of the case, but intended to leave before the Superior Court the matters not appealed from, as well *as the matters not decided*, for further adjudication in case the judgment should be reversed, and that the general jurisdiction of the case, which includes in this case the right to consider and adjudicate the title of the riparian owners according to the original complaint and the answers thereto and the proofs and to allow further pleadings or amendments and further proofs agreeably to the suggestion

of the Supreme Court in Judge Newman's second opinion (page 549), pertaining to the untried issues as to riparian rights, never came within the jurisdiction of the Supreme Court and remained before the Superior Court to be considered, provided the Court should reverse those parts of the judgment appealed from, and that therefore the Supreme Court could not, as it might have done if the appeal had been from the entire judgment, make any order except touching those matters appealed from.

Cassoday, Chief Justice, says in opinion on the motion to dismiss our appeal (Record, page 578):

"Those appeals were by three of the defendants in the cross-bill filed by the Canal Company, from so much and such parts of the judgment of the trial Court as sustained the paramount right of the Canal Company to all of the water power created by the government dam at Kaukauna, and the exclusive right to use or authorize others to use the same, wherever it might be available for water power, and to return the water to the river wherever it should see fit; but the balance of that judgment, relating as it did to the partition of the water power between the several riparian owners below the dam, had *been entered by agreement and stipulation between the riparian owners, including the Canal Company*, AND FROM THOSE PORTIONS OF THE JUDGMENT THERE HAD BEEN NO APPEAL, AND HENCE THE SAME WERE NEVER BEFORE THIS COURT FOR CONSIDERATION."

I call attention to those parts of the opinion for two purposes: First, the point to which I cite it, that where there was no appeal there could be no consideration by the Supreme Court; and, second, to correct what I conceive to be an error of the Court when they say: "But the balance of that judgment, relating as it did to the partition of the water power between the several riparian owners below the dam had been entered by agreement and stipulation between such riparian owners, including the Canal Company." This statement is misleading. There had been no agreement or stipulation between the riparian owners as to any part of the judgment that should be rendered. Certain facts had been stipulated as facts, but no place had been stipulated for them in the judgment, and no conclusions to be drawn from such facts had been stipulated.

The particular stipulation to which the Court refers is to be found at page 492 of the record, near the bottom of the page.

It follows from this that the Supreme Court did not take full jurisdiction of the case by the appeals, and that the order of the Court in its remittitur to the Superior Court, commanding that Court to enter judgment in accordance with the opinion, exceeded the jurisdiction of the Supreme Court, because it cut off any further consideration of those rights of the parties which had been *temporarily* superseded by the first judgment of the Superior Court, but which were restored by the reversal of that judgment.

And that at the very utmost the Supreme Court took jurisdiction only to consider the part of the judgment appealed from, reverse the judgment and direct the Court below to proceed further in the case in accordance with its opinion. That would leave before the Superior Court when this judgment was reversed all of the allegations in the original complaint and the answers thereto, which had never been tried nor determined by that Court, and which had found no place in the judgment that was entered.

When the mandate was made, the original pleadings which consider riparian rights only still remained before the Superior Court. The rights of the parties as riparian owners had never been considered or acted upon by that Court. The single issue whether the water powers belonged to the riparian proprietors, of whom the Canal Company was a principal one, or to the Canal Company alone under the paramount right of sovereignty, *as claimed in the cross-bill*, had alone been considered. Judgment thereon had been entered in favor of the Canal Company upon its cross-complaint and answers thereto, and a part only of that judgment had been brought to the Supreme Court. There had been no judgment of the Superior Court fixing the riparian rights of the parties; it had never considered the riparian rights *except* as opposed to the rights claimed by the plaintiff in error in its cross-bill.

The original pleadings did not put in issue the right of the Canal Company as owner of all the water power created by the pond, and of the north bank of the river down to the down-stream line of the up-stream half of private claim number one, to draw the water appurtenant to the north bank from the pond through the canal and use it in the mills of its tenants. On the contrary, they admitted the right of the Canal Company as riparian proprietors to draw water appurtenant to the north bank of the river from the pond through the canal and use it in the mills. It is true, the Kaukauna Water Power Company had stated in a pleading that it was the duty of the Canal Company, if it used the water from the pond, to return it to the river between the foot of the cross or spill dam and the head of Island No. 4, but that statement was made as an answer to the claim of the Canal Company to the whole power of the river by prescription. It was not stated as the foundation for relief, no prayer for relief was made in the pleading, and there was no suggestion that the right of the Canal Company was intended to be brought in issue or tried. It had never been considered by the Superior Court or the Supreme Court. This is apparent from the judgment of the Superior Court, which is silent on that subject, and from the opinion of Justice Newman, who said in an opinion delivered upon a motion for rehearing which called attention to the fact that it was impossible from the original opinion to tell how or when the Canal Company should use that proportion of the stream which is appurtenant to the north bank of the river. He says that "that is a just estimate of the opinion." "It (the Court) could well do no more. The Court had no concrete question before it. No such issue was made. No such judgment asked by the respondent's, the Canal Company's, pleading, nor was any such issue adjudged by the trial Court," etc. (Record, p. 550.) If the Canal Company on its cross-complaint should prevail, then nothing was left of the claims in those pleadings to try. The Superior Court held that claim good, and gave judgment sustaining it to the full extent,

and the riparian claims were simply superseded. There was nothing left to which they could apply; but they were there in the record, and when that judgment was reversed the case was left in the same condition it was when the cross-complaint was filed, except that the riparian rights pleaded by the defendants in error had been held good to the exclusion of the claim of the Canal Company in its cross-complaint, and there was nothing to prevent the trial of the case made by the original pleadings the principal issue, namely, the flow of the channels had been fixed by stipulation. In no other respect was the case any nearer judgment than the day the amended cross-complaint was filed. There being something in the record which did not go to the Supreme Court, the mandate of that Court was in excess of its jurisdiction, and the property taken in obedience to that mandate was not due process of law.

II.

The judgment of the Superior Court entered in obedience to those mandates, to the extent that the mandates exceeded the jurisdiction of the Supreme Court, is not due process of law.

The recitals of the last judgment of the Superior Court (page 554) are substantially as follows:

"* * * All of said appeals being from the judgment rendered and entered herein *on the issue joined upon the said cross-complaint of the Green Bay and Mississippi Canal Company*, on the 19th day of January, 1894, and said judgment so entered in and by this Court on said 19th day of January, 1894, having been reversed upon each of said separate appeals by the judgment of said Supreme Court, and said Supreme Court having remitted to this Court the record and papers transmitted to said Supreme Court on said appeals, together with its decision, wherein, among other things, it decided and directed that this cause be and the same is hereby remanded to the said Superior Court, *with directions to enter judgment in accordance with the opinion of this Court.*

First. Upon motion of Hooper & Hooper, plaintiff's attorneys, it is considered, adjudged and decreed, etc."

No other authority for the entry of this judgment than such mandates is recited in the judgment—no trial—no argument

of counsel. So that the judgment depends for its warrant solely upon the mandates of the Supreme Court. If the mandates are without jurisdiction, of course, the judgment is without jurisdiction.

III.

That judgment took away the property of the Canal Company, namely, the right to draw the surplus water of the river appurtenant to the north bank of the river, from the pond, through the canal at the level of the pond, and through the mills of its tenants, for water power, without due process of law, and is therefore repugnant to the Constitution of the United States.

The judgment is at page 354 of the record and the clauses bearing upon this point are the following:

"First. Upon motion of Hooper & Hooper, plaintiff's attorneys, it is considered, adjudged and decreed, as in favor of the Patten Paper Company (Limited), Union Pulp Company and the Fox River Pulp and Paper Company, against all the defendants, *that all of the water of the river, except that required for the purposes of navigation, shall be and is hereby divided and apportioned between and to the south, middle and north channels of the river,* in the following proportions, that is to say: 43-200 thereof should of right flow down the south channel, 157-200 thereof should of right flow down the main channel of the river, north of Island No. 4, and that of the water so of right flowing down the main channel of the river, north of Island No. 4 and above the middle channel, 62-157 thereof should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel north of Island No. 4 and above Island No. 3, 95-157 part should of right flow down the north channel and north of Island No. 3, *and each of the parties to this action, their heirs, successors and assigns are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid.*

Second. Upon motion of Messrs. Fish and Cary, attorneys for the said appellants, Kaukauna Water Power Company and others, and David S. Ordway, attorney for said appellants, Henry Hewitt, Jr., and Wm. P. Hewitt, it is considered and adjudged upon the *issues joined by the cross-complaint of the defendant, Green Bay and Mississippi Canal Company, and the ser-*

eral answers made thereto by the other parties to this action, defendants in said cross-complaint, that the water power which was created incidentally by the erection of said dam at Kaukauna is due to the gravity of the water as it falls from the crest to the foot of the dam proper across said river, *and not to the use of the water of said river through said canal*, and that neither said State of Wisconsin nor said Green Bay and Mississippi Canal Company, as assignee of said state, ever acquired or owned any water power upon said river at Kaukauna by reason of or as incidental to the construction and use of said canal for navigation.

Third. And it is further adjudged by the Court that said Green Bay and Mississippi Canal Company, its successors and assigns, shall so use the water power, if at all, created by said dam, *as that all the water used for water power or hydraulic purposes shall be returned to the stream in such a manner and at such place as not to deprive the appellants or those claiming under or through them of its use as it had been accustomed to flow past their banks, and that it shall flow past the lands of said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow*, and that said appellants have the right to use the water of said river, except such as is or may be necessary for navigation, as it was wont to run in a state of nature, without material alteration or diminution."

It is obvious from an inspection of plaintiff's Exhibit "A 1," that if the water from the pond must come into the river above the head of Island No. 4, that it can not be drawn through the canal and go to the mills of the tenants of the plaintiff several hundred feet below the head of Island No. 4, and that if this judgment is enforced that the plaintiff and its tenants are deprived of the use of the water power by drawing the same from the pond and at the level of the pond through their mills and thereby utilizing the fall of the pond and the fall of the river upon the land of the Canal Company together as they have been accustomed to do.

There remains under this head the question as to whether the water power of which the judgment so deprives the Canal Company belong to that company. It was created by the construction of the dam and work of improvement, A, B, C, D, E, F, G, on the accompanying

map. There is no part of that work not absolutely necessary to the existence of that water power. Every bit of it acts as a dam maintaining the pond. The dam on the south side keeps it within the channel of the river. The spill dam maintains and rules the head and provides a place for the waste water to run down the stream, and the lower embankment maintains the water in the canal, which carries it down to the mills. Every part of it is also a necessary part of the public improvement for the benefit of navigation. It maintains the level of the pond for slack water navigation up to the foot of the next rapid. No part of the work could be abandoned or injured without injuring navigation. It was part of the original plan adopted by the Board of Public Works of the State for the construction of the improvement to navigation at this point. The only difference between the plan originally adopted and this is that the south embankment is still a little further out into the stream than was necessary under the original plan, in order to use the surplus water of the river for water power, agreeably to Martin's contract with Lawe and his bond to Lawe made at the time of the beginning of the work in December, 1851. (Pages 379 et seq.)

In a suit between the Kaukauna Water Power Company and the Green Bay and Mississippi Canal Company, which the Canal Company brought against the Kaukauna Company, this Court (142 U. S., 254) enjoined that company, as a riparian proprietor, from cutting the embankment on the south side of the pond and withdrawing the water therefrom, through the canal, for purpose of water power, and held that by reason of the construction of this dam and work of improvement at this point, that the Canal Company was the owner of all the water power created by the pond as far as the dam, that is the spill dam.

The only difference between that case and this is that in that case the contest was as to the right of the Kaukauna Company as riparian owner on the south bank of the river to cut the dam and draw that part of the surplus water of the river appurtenant to the south or right bank of the river from the

pond at a point on the south side of the pond about thirty rods above the spill dam, and the State Court and this Court enjoined them from so doing, while in this case the State Court has required the Canal Company to turn *all* the water of the river into the bed of the river at the foot of the spill dam.

Upon what principle can this be done? The only use of this surplus water is for water power, and the only contention in this case is touching water power.

The principal right of the riparian owner to this stream is the right to use the flow of the river for water power on his land. That is necessarily in derogation of the free flow of the river. The right to use the water for water power is appurtenant to the title of the land. Where the banks are owned separately there must be separate rights to the use of the water, depending upon the title to the banks of the stream. In order to the usual use of the water of a stream for purposes of water power it is necessary to arrest the flow of the stream, and in some way to raise a head in or by the stream, and to separate the water to be used from the remainder of the flow of the river. It is also necessary to the use, that the part of the flow used should pass through the wheels of the owner using the water. These are physical conditions precedent upon the use of the water for water power, and to hold that the owner of either bank has the right at will to prevent the owner of the other bank from constructing such ordinary appliances for the use and so using the part of the stream appurtenant to his land in an ordinary and usual way for the purpose of taking advantage of them in order to put the water power in use, is to say that an opposite riparian owner has the power to forbid the other owner from the use of his water.

The Canal Company owns an easement on the north bank of the river throughout this whole level from the head of the pond down to the lock for flowage and purposes of water power. The Kaukauna Company, for purposes of water power, owns the south bank of the river from the spill dam to slack water below the rapid, but is not the owner of any of the water power of the pond. If it uses water on that side of the river, it must use it

from the level of the foot of the spill dam—that is, the upper end of its riparian right, as adjudged in the Kaukauna case by this Court.

The Patten Paper Company's right of flowage begins at the head of the middle pond several hundred feet below the head of Island No. 4, and yet the State Court has, upon the request of the Patten Paper Company, adjudged that this company must divide the water power right which it has from the head of the level to the lock into two levels for water power purposes at the foot of the spill dam in this level.

That part of the judgment which compels the Canal Company to make this division and turn the surplus water of the river appurtenant to the north bank into the bed of the river at the foot of this dam, is the injury complained of in this discussion. The right of the riparian owner to the water power of the stream is according to the claim of the defendants in error, is co-extensive with his title to the land. If that is absolute he has the absolute right to the use of one-half the flow of the river as he pleases on his own land. To this judgment of the State Court adds this additional right in qualification of the right of the owner of the left bank, viz: that the riparian owner on the right bank of the river may require the riparian owner on the left bank of the river, whose land extends above or below the owner on the right bank to abandon the appliances which the riparian owner on the left bank has constructed in order to use the whole fall upon his land at one head, and to divide the fall on his land into two parts, dividing where the right of the riparian owner on the right bank begins. Of course, it would give the corresponding right to the owner of the left bank over the use of the water appurtenant to the right bank, so that neither owner could use his water power except with the assent of his opposite owner. If the right to sever the fall of the owner on the left bank exists in the owner of the right bank, then the owner of the left bank does not own his water power, and the owner of the right bank, in addition to the ownership of the water power on his own land, has a

dominant right over the title of the water power on the left bank of the river!

This right is claimed upon the authority of paragraph 100 of Angel on Watercourses, where it is fully stated and certain authorities are cited to sustain it, no one of which bears out the text.

The principal one of these is the case of Webb vs. the Portland Manufacturing Company, 3 Sumner, 189, which was this:

The plaintiff and defendants were owners each in severalty of several mills upon a dam. The defendant built a new mill upon the stream below the dam and sought to cut a canal from the head of the pond created by the dam and carry a small amount of water, much less than he was entitled to use at the dam, from the pond around the dam, to drive his new mill.

The case is insufficiently reported. There is nothing to show under what contract the plaintiffs and defendants built or owned the dam upon which their mills stood. The defendants justified the right on the ground that they were mill owners on the lower dam, and were entitled as such to half of the water of the stream in its natural flow, and that they really drew from the pond through the canal only about one-fourth of that quantity of water.

In answer to that Judge Story says:

"It is said that the defendants are mill owners on the lower dam and are entitled as such to their proportion of the water of the stream in its natural flow. Certainly they are, *but where are they so entitled to use it? At the lower dam, for there is the place where their right attaches, and not at any place higher up the stream.* Suppose they are entitled to use for their own mills on the lower dam half the water which descends to it, what ground is there to say that they have a right to draw off that half at the head of the mill pond?"

It will be seen that the situation of the parties is not what it is here, one party owning one bank of the river and the other owning the other bank, but so far as the report goes both parties owned undivided, unascertained interests in the water power, part of each of which were probably on one side of the stream and the others on other parts, because if the parties had been seized the one of one bank of the river and the other of the

other bank, as in this case, and there had been no contract in regard to the manner of use, it could not have been true that the rights of the partiies to the water power attached at th dam, and any such facts would have been set out in defense.

Judge Story gives other reasons for the decision. He says in effect that the necessary result of withdrawing this water from the upper end of the pond would be a lowering of the head of the stream and thereby injuring the mill privileges of the plaintiff. He says:

"Suppose the head of water at the lower dam in ordinary times is two feet high, is it not obvious that by withdrawing from the head of the pond one half of the water the water the pond must be proportionately lowered. It makes no difference that the defendants insist upon drawing off only one-fourth of what they insist they are entitled to, for *pro tanto* it will operate in the same manner."

Now with deference I think that in that Judge Story was in error. I think if the defendant had withdrawn one-fourth even one-half only of the water from the mills that the po would have always remained full, provided it was full in beginning, and the plaintiff would always have drawn his wa at the full head of the pond and from a full pond.

Judge Story relies for his decision upon the case Blanchard vs. Baker, 8 Greenleaf, 270, which was a case wh the owners of an undivided interest in an ancient mill undertc to excavate an old channel and through this excavated chan withdraw from the river what they claimed was their share the river to a new dam and mills which they had constructed use the same and the Court held that they could not.

Mr. Angel also cites as authority for this doctrine the case Vandenburgh vs. Van Bergen, which was a case where the l owner of the undivided half of a large tract of land grante mill site well described and also "full liberty and license erect and build another mill at any other place at or on same creek, with like liberty of ground and stream of wate Thirty years later a subsequent grantee of this mill site a privilege built a dam on the stream and flowed land which t original grantor had conveyed twenty years before, and t owner of the land which was flowed brought trespass and t

In all the cases cited by Mr.Angel, except possibly the case of Webb.vs.Portland, etc., all the parties were tenants in common of the land on both sides of the river, and of the mills and dam, and therefore tenants in common of the stream. In the case of Webb vs.Portland the statement of title is this:

"The plaintiff is the owner of certain mills and mill privileges in severalty upon the lower dam and the defendants are entitled to certain other mills and mill privileges on the same dam, also in severalty."

There is no statement of the ownership of the banks. So that it can hardly be possible that in that case the plaintiffs and defendants were not tenants in common of the banks of the stream. Such a material question certainly, it seems to me, would not have been overlooked by counsel or the court. In our this case the opposite riparian owners ~~were not~~ are tenants in severalty. The United States being the owner of the entire territory patented to the grantors of the plaintiff in error Sec.24 and Private Claim No.1, on the north side of the river, both of which were bounded by the river on the south and neither of which extended across the river. They also patented to the grantors of the Kaukauna Water Power Company the south bank of the river, as parts of Sections 21 and 22, which were bounded north by the river, neither of which sections extended across the river. The United States also sold each of the meandered islands in the stream as separate parcels of land, bounded by the different channels, neither of which extended across the channels which bounded them, so that as to the north or left bank of the stream the Canal Company was seized in fee of the whole shore of the pond and the river, down to the red mill, and of the undivided half of the red mill down to a point a considerable distance below the first lock. The Kaukauna Company was the owner of the whole south shore of the river throughout the full extent of the rapid, and the Fox River Pulp Companies ~~x~~ were grantees of so much of Islands No.3 and 4 as were bounded by the middle channel. Being such owners of the banks ~~xx~~ water power appurtenant to the banks followed the title of the banks. The owner of each bank is the owner in severalty of the water power appurtenant to that bank, provided always the Canal Company has not paramount title to the whole bed and water power of the rapid.

defendant undertook to justify under that deed and the Court say:

"The deed from the Van Bergens for their moiety does not in the terms of it profess to grant any privilege in the water beyond the limits of the mill site or falls intended to be conveyed by that deed. The right of building a dam at that place must be exercised in such a manner as not to injure the previons rights of other persons, *besides the grant of an undivided share in a stream of water would not authorize the grantee to appropriate or modify the stream to the injury of others who have a joint interest in it. The property in a stream of water is indivisible*," etc.

These are the leading cases upon which Angel relies for his statement in paragraph 100, and it is submitted that they do not bear out the doctrine that he deduces from them. Certainly the doctrine can not be carried so as to require the owner of one bank of a river to hold the right to improve his water power on his side of the stream at the pleasure of the opposite proprietor.

THIS QUESTION IS NOT IN THE CASE.

The question as to the right of the Court to deprive the Canal Company of the right to draw water from the pond through the canal, for water power has not been started by the pleadings, but it is a dangerous doctrine. It has got into the books without protest, and it ought not to have further sanction.

THE RIGHT TO UNITE THE FALL OF THE POND WITH THE FALL AT THE MILLS AS IT HAS BEEN DONE WAS A PROPER EXCUSE OF THE POWER OF THE STATE, WHICH POWER THE STATE GRANTED TO THE IMPROVEMENT COMPANY.

This is a navigable stream. To be sure, the defendants say that it isn't navigable in fact at this point, and they proceed to illustrate the fact by proving that navigation was difficult, almost impracticable. Although it had been declared a navigable stream by the ordinance of '87, and although it has been adjudged a navigable stream under the control of the government repeatedly, and that its navigation is under the jurisdiction of the Courts of the United States, in Montello, 20 Wallace, 430 and cases which have followed it, yet the defendants in error say that this rapid was never navigable except with Durham boats, and they claim, therefore, the right

to dam the river as against the State and the United States, so as to make the right of navigation, instead of difficult, impossible.

If it is a navigable stream, it is under the control of the State. The State has for the purpose of constructing this work of improvement under the act of Congress of 1846, which made a grant to the State for that purpose, passed the canal act of 1848, under the act the State adopted this plan for improving this rapid. The 16th section of that act provides that when, in the making of the canal or other work of improvement, a water power should be created, it should belong to the State. The State, by Chapter 98 of the laws of 1853, gave the Improvement Company all the power, rights and privileges of the State.

Under the decision of this Court in 142, the construction of this work of improvement in the manner it has been constructed down to the spill dam was a proper exercise of the power granted by the Legislature, and justified the taking of the whole flow of the river at the pond for water power. It certainly follows that completion of the level by the construction of the canal by the Improvement Company, pursuant to the plan adopted by the State, would justify that company, which was also the owner of the north bank of the river in carrying the flow of the river appurtenant to the north bank along in the canal and use the surplus water for water power to add to the water power the right developed in creating this work of improvement, while it permitted the remainder of the surplus of the river to flow over the dam and pass down into the river below. That has been done and this water power now in question has been created and put in use thereby. This is certainly a proper exercise of the executive and legislative power of the State, which the Courts could not interfere with.

THE DEFENDANTS HAS CONSENTED TO THIS USE, the State and the Fox and Wisconsin Improvement Company and the Canal Company has exercised the right of drawing the water from the pond through the canal into the mills of their tenants more than twenty-five years from the

time of the first exercise of the right in 1860 by the Cord and Gray lease until the entry of this judgment, without any let or hindrance or complaint by any person. From that the Court must determine the asssent of the then owners of the property to the exercise of this right.

If anybody was injured by the assertion of that right and the creation of the work of improvement so as to exercise it, it was the people who owned the land at the time of the assertion and the exercise of the right was begun, either in 1851, when the right was made a public record by the record of Martin's contract with Lawe, or when the improvement was completed under that contract in 1855, or when Cord and Gray began to draw the water under their lease from the pond through the canal to their mills on the site of the present mills.

None of these defendants were possessed of any interest in this property until twenty years later than that, as appears by Mr. Ordway's statement of title, page 497. If any injury has been done to the riparian owners of the south side of the river or to the riparian owners on the island, it was done when the appliances for doing the injury had been constructed and were put in use and the water was being used thereby. The then owners did not object. It does not lie in the mouths of their grantees twenty years afterwards to make the claim. THE RIGHT TO THIS USE OF THIS POWER HAS BEEN PLEADING THE DEFENDANTS.

But there is still another reason why the Supreme Court had no authority to interfere by this judgment. It is that there are no pleadings to justify it. No pleading denies the right of the Canal Company to use the half of the water of the river appurtenant to the north bank for water power, nor is there any demand for any judgment denying that right. On the contrary, the pleadings of every one of the defendants in this case admit the ownership by the Canal Company of the left or north bank of the river for purposes of water power, and they also admit the accustomed exercise of the right of the Canal Company to draw water from the pond through this canal and use

it through the mills of its tenants, as it is being used. The Patten Paper Company pleads the rightful use of the water in Sections 13 and 14, page 17, of its complaint, as follows:

"That the Green Bay and Mississippi Canal Company has a canal leading from the said mill pond maintained by said dam across the Fox river, above Island No. 4, along in line with and north of the north bank of said Fox river, to a point below the head of said Island No. 3.

"That such canal is large enough to pass and is intended to pass at least one-half of the flow of said river, and to pass the same down said canal and into the said river at a point below the head of Island No. 3, and so that the same can not run and pass into said middle channel, and so that the same can not come into the mill pond formed between said Islands No. 3 and 4 by the dam from the one to the other, and during the past summer has so passed about half the flow of said stream, so that the same has not and could not come into said mill pond between Islands No. 3 and No. 4, and called the Meade and Edwards water power.

"14. That the Green Bay and Mississippi Canal Company and its lessees and tenants are and for several years have been and propose to and will continue drawing and passing through their canal on the north side of said river, from the mill pond maintained by the above dam at Island No. 4 to a point below the head of Island No. 3, and so that it can not pass into said middle channel and into the mill pond furnishing water to said plaintiff's mills, about one-half of the flow of the Fox river *and the half appurtenant to said north channel.*"

The complaint also, on page 33 of the record, sets out the title of the Canal Company to the north shore of the river as follows:

"27. That that part of fractional section 24 bordering on said north channel is owned by the Green Bay and Mississippi Canal Company.

"28. That that part of private claim number 1, bordering on said north channel, is owned by the Green Bay and Mississippi Canal Company, and Henry Hewitt, Jr., and William P. Hewitt, but in just what shares these plaintiffs do not know, such title to part of the same being in litigation between said Canal Company on one side and said Hewitts on the other."

These allegations are made for the purpose of showing that the Canal Company is rightfully entitled to draw the one-half

of the flow of the river which is appurtenant to the north bank of the river from the pond through the canal and discharge it into the north channel in order to establish the fact that the Kaukauna Water Power Company, which the complaint alleges is drawing one-half of the flow of the river from the pond through its canal and discharging it into the south branch of the river below the dam on the middle channel, so that it can not come into the middle channel and be used by the plaintiff, is *wrongfully* drawing that water to which the plaintiff is entitled, because if the Canal Company is rightfully drawing one-half the flow of the river and the Kaukauna Company is drawing the other half of the river, it must be drawing that part of the water to which the middle channel is entitled; but if the Canal Company is not rightfully drawing a half of the flow of the river, no such conclusion would follow.

The defendants, the Kaukauna Water Power Company and its tenants, set out the title of the Canal Company to the north bank of the river and its right to draw the water from the pond through the canal, on page 163, and the defendant Henry Hewitt, Jr., on page 172, and the defendant William P. Hewitt, on page 182, as a defense to the claim of the plaintiff in error to the whole water power of the river made in its cross-bill, substantially as follows:

"And these defendants further state that at the time of making all of the aforesaid leases (which were leases of water power to be drawn from the pond through the government canal on the north side of the river through the mills of the plaintiff and its tenants into the river below), the Fox and Wisconsin Improvement Company, or the Green Bay and Mississippi Canal Company, were the owners of all of the land bordering on the north side of said Fox river from above said government dam down to said lot one of said Jenne's plat, and were also the owners of the undivided half of the land bordering on the north side of the north channel of said Fox river from the up-stream line of said lot one of said Jenne's plat down stream to a point a few rods below or down stream from the first lock now existing in said canal."

This allegation is made to meet the claim made by the Canal Company to the whole water of the river by adverse user. If the Canal Company had the right to draw one-half of the water, and only did that, there could be no adverse user.

These statements are admissions of record of the title of the Canal Company to the north bank of the river from the pond down to 1 on the map, and are conclusive admissions by the defendants of the right of the Canal Company to so draw the water. They plead the assent of the defendants to such use. They are also admissions that the Fox and Wisconsin Improvement Company and the Canal Company *rightfully* leased the right to draw water from the pond through the canal and through the mills of the tenants of the Canal Company standing upon that land from the year 1860 down to the filing of said pleadings. There is nothing in the record to qualify these admissions in any respect, except the following statement in the answer of the Kaukauna Water Power Company on page 162:

"And these defendants state that none of the water of said Fox river, except what is necessarily taken into said canal above said government dam for the purposes of navigation (being only a flow of about one thousand cubic feet per minute), is or ever was necessary for navigation purposes below said dam, but that the whole flow of said river, except such part thereof as is so, as above stated, necessary for the purposes of navigation, should, if used by said Green Bay and Mississippi Canal Company for private or hydraulic purposes, be used by it at said government dam, and all of the water so used by it or its lessees should be returned to the bed of the stream immediately at the foot of said dam above the head of Island number four (4), so that the same and in such manner that the same may be distributed over and down the various channels of said river, as and in the same proportions and to the same depth as the same was wont to run in a state of nature."

The only part of this statement that in any sense qualifies the allegations of the title and the drawing of the water by the plaintiff in error is the following:

"And that the whole flow of said river, except such part thereof as is so, as above stated, necessary for the purposes of

navigation, should, if used by said Green Bay and Mississippi Canal Company for private or hydraulic purposes, be used by it at said government dam, and all of the water so used by it or its lessees should be returned to the bed of the stream immediately at the foot of said dam," etc.

That allegation is purely a conclusion of law, and does not override the statements of fact as to the title and the draft of water from the pond through the canal for water power theretofore made in the pleadings, *nor does it indicate any intention to put on trial the right of the Canal Company to continue leasing water for power, as the pleadings charge it has been doing.*

If any of the defendants in error have any right to any of the water power of this river, it is in virtue of their title as riparian owners on the river, and exactly the same title which the Canal Company has to the water appurtenant to the north bank of the river; and they are estopped by their claim of the right to the water power of the stream, because they are riparian owners thereon, to deny the right of the Canal Company to the water power as such riparian owners, as they have charged the Canal Company to be in their pleadings.

IV.

The judgment of the Superior Court, to the extent that it took away the right of the Canal Company to draw the surplus water appurtenant to the north bank of the river from the pond through the canal and the mills of its tenants, is contrary to the pleadings. There are no pleadings to justify it. No party had prayed such a judgment. The jurisdiction of a Court comes from the pleadings and is necessarily limited by them. It is, therefore, not due process of law, and inasmuch as it takes away the property of the plaintiff in error, it is repugnant to the constitution of the United States.

As we have before stated, there is no pleading in the case in which the right of the plaintiff to draw the water from the pond which is appurtenant to the north bank of the river is attacked. No pleading denies that right. That, on the contrary, each of the defendants admits in his and its pleading the title of the

Canal Company to its bank of the river and its accustomed exercise of the right for more than twenty years to draw the water of the pond through the canal to the mills of its tenants for water power.

So much of the judgment, therefore, as adjudges that the whole water of the pond shall go into the river at or above the foot of the spill dam and above Island No. 4, so that the whole flow of the river shall run in the channels north and south of that island, and if sued by the Canal Company shall be returned to the stream so as to flow along the lands of the defendants as it was accustomed aforetime to flow, which we assume to mean is to flow in a state of nature, and as enjoins the plaintiff from interfering to prevent it so flowing, are in the teeth of the pleadings, and there are no pleadings which give either Court jurisdiction to enter such a judgment.

We have already sufficiently called the attention of the Court to those pleadings. The direction of the entry of that judgment by the mandates of the Supreme Court and the entry by the Superior Court of the judgment in pursuance of those mandates, was an unauthorized meddling with the property rights of the Canal Company and of its tenants by those Courts. It took away from the Canal Company, without pleadings and upon its own motion, a property right of the value of more than $200,000, and it destroyed the property of the tenants of the company invested in mills constructed to use that water power, which are worthless without the power, to the amount of nearly $300,000 more.

This Court has had occasion to consider this question in Penoyer vs. Neff, 95 U. S., 714, and again in McNeal vs. Scott, 154 U. S., 35-46.

From these considerations it follows that the Supreme Court of the State, without jurisdiction thereunto, by its mandate, required the Superior Court, without other jurisdiction, to enter a judgment, which that Court entered in pursuance of such mandate, which judgment when entered operated to

deprive the plaintiff of its property, to-wit: the right to draw the water appurtenant to the north bank of the river from the pond through the canal and the mills of its tenants below for water power; that the judgment so entered has deprived the plaintiff in error of that property without due process of law, and that the same is therefore repugnant to the constitution of the United States, and must be reversed.

E. MARINER,
Attorney for Plaintiff in Error.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,

Plaintiff in Error,

vs.

THE PATTEN PAPER COMPANY, ET AL., IMPLEADED ETC.,

Defendants in Error.

In Error to the Supreme Court of the State of Wisconsin.

ARGUMENT FOR PLAINTIFF IN ERROR.

WILLIAM F. VILAS,
Of Counsel for Plaintiff in Error.

B. J. STEVENS,
Solicitor,

E. MARINER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

NO. 190.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,

Plaintiff in Error,

vs.

THE PATTEN PAPER COMPANY, LIMITED, ET ALS. IMPLEADED, ETC.,

Defendants in Error.

POINTS AND ARGUMENT

OF WILLIAM F. VILAS FOR THE PLAINTIFF IN ERROR.

I.

THE FEDERAL QUESTION.

In the briefs of Mr. Stevens and Mr. Mariner, filed in opposition to the Motion to Dismiss the Writ of Error, as well as in the brief of Mr. Stevens filed upon this hearing, the argument is so abundantly and satisfactorily presented to the point that the judgment of the State Supreme Court was rendered without jurisdiction and deprives the plaintiff of its property without due process of law, that no effort will be made in this brief to add to it; but what is here submitted to the juris-

diction will be directed to the other Federal question raised by the record; and the rather, because that necessarily brings before this Court for review the entire controversy in the case fully upon its merits, while the argument in its support appears equally satisfactory.

The rights and privileges of the plaintiff are held under the statutes and authority of the United States, and the decision of the state court was against the rights and privileges so claimed and enjoyed.

It is conceded on all hands that the plaintiff possesses some rights and is entitled to some privileges in the use of the water power created by the dams and works of improvement on the Fox river. Without at all undertaking now to define those rights or privileges, it is necessary first, independently, to point out that they are held by the plaintiff under the statutes and authority of the United States, and that, therefore, the measure of those rights and privileges is a Federal question.

The facts and reasons upon which this proposition rests would appear incontestable and irrefutable.

1. The Fox river is a public navigable water of the United States, subject to their exclusive control as a highway of navigation, whenever and to whatever extent they choose to exert it. Although within the territory of a state, it is not the less a route of interstate commerce, and the Federal right of jurisdiction is exclusive at the pleasure of Congress. It is not in this respect distinguishable from the Mississippi river, the Ohio, the Missouri, the Columbia, or the great lakes; and whatever Congress may rightfully do in respect to these, it may also do in respect to the Fox. Its sovereign authority is not less paramount and absolute, the authority of the state of Wisconsin not less subordinate and permissive, on the Fox than on Lake Michigan.

The Ordinance of 1787 declared this character to appertain to this river before the Constitution, it clearly endured throughout the period of the various Territorial governments, was expressly stipulated at the time

Wisconsin was admitted to the Union to abide and continue thereafter; and without that stipulation not less than with it, that character necessarily remained unqualified, under the Constitution; and thus, as a highway of navigation for interstate commerce, power over that river is Federal, lodged in Congress, within the grants of Sovereignty centered in the Union, paramount to and exclusive of State interference.

All this was by this Court decided, or implicitly results from its decision, in the case of *The Montello*, 20 Wall. 430, when this character of the river was under particular consideration. The doctrine there applied to the Fox has been repeatedly enunciated by this Court.

The Genesee Chief, 12 Howard 443.
The Daniel Ball, 10 Wall. 555.
The Eagle, 8 id. 15.
Ex parte Boyer, 109 U. S. 629.
In re Garnett, 141 id. 1; 15.

2. It is important to take some note here of the nature of this Federal power, and of the completeness of its extrusion of all state jurisdiction or interference.

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a state other than those in which they lie. For this purpose they are *the public property of the nation*, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation *interposed by the states*, or otherwise; to remove such obstructions where they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders." *So. Carolina vs. Georgia*, 93 U. S. 10.

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and *although the title* to the shore and submerged soil *is in the various states and the individual owners under them*, it is *always subject to the servitude* in respect of navigation created in favor of the

Federal government by the Constitution." *Gibson vs. The United States*, 166 U. S. 271–2.

In exercise of this authority, the United States may divert the natural flow of the water from one bank to the other, from one channel to another, entirely close a channel where it was accustomed to flow, build an artificial channel in place of the natural one and change the course of the stream to flow therein, cut off the previous access to and enjoyment of the water by a riparian proprietor, dig up and remove soil and earth within the banks, build jetties, piers, light-houses or other works of improvement on the land within the river margin, and other like appropriations make of the soil within the water's confines, *as of Federal public property*, without condemnation or compensation to owners, whether state or individual, or recognition of riparian proprietors for any losses they may sustain; because all ownership of such riparian or submerged lands is subject to that servitude. *So. Carolina vs. Georgia*, *Gibson vs. United States*, *supra*.

Wisconsin vs. Duluth, 96 U. S. 387.
Transportation Co. vs. Chicago, 99 U. S. 635.
Eldridge vs. Trezevant, 160 id. 452.

In like manner entire control of *the use of the water* by navigators and others is exclusively vested in the Federal authorities, and regulations for the government of vessels, their mode of navigation, their signals and conduct in all particulars, the license of masters, engineers, pilots, other officers and seamen, the inspection of machinery, the rates and payment of tolls, fees, charges of whatever kind, and of all other circumstances of navigation, must proceed from the Federal authority, and exclude all intervention by the states.

Gibbons vs. Ogden, 9 Wheat. I.
The Daniel Ball, 10 Wall. 557.
Sinnot vs. Davenport, 22 How. 227.
Foster vs. Davenport, *ibid.* 244.
Henderson vs. The Mayor, 92 U. S. 259.
Lung vs. Freeman, *ibid.* 275.
People vs. Compagnie Gen'le, 107 U. S. 59.

So, too, the admiralty and maritime jurisdiction of the Federal courts extends to all these waters to the

entire extrusion of the state courts; and the peculiar principles of the maritime law dominate the rights and remedies of all concerned in navigation, overriding and nullifying all local laws or state statutes.

The Glide, 167 U. S. 606.
The Genesee Chief, 12 Howard 443.
The Eagle, 8 Wall. 20.
In re Garnett, 141 U. S. 1, where as well as in the case of *The Glide*, the cases in this court are collated.

In fine, the United States are interested in such water highways not as a mere proprietor only, but also as sovereign, exercising one of the highest prerogatives of government, a prerogative which the states conferred on the Federal Union by the Constitution; and, necessarily, when Congress assumes control of a public navigable river every other authority is utterly ejected and every attempt at intrusion illegal.

3. A brief review of its action, and the circumstances to which it was applied, will leave no room for doubt that Congress has so assumed complete and exclusive control and exerted the full Federal jurisdiction over the Fox river. The first steps were taken so soon as settlement had advanced sufficiently to give promise of usefulness to the improvement of that water channel. Two days after the enabling act for the state of Wisconsin was passed, another act was signed which granted to the state on its admission to the Union a quantity of land equal to one-half of three sections in width on each side of the Fox river, from its mouth to the portage to the Wisconsin, for the purpose of improving the navigation of those streams. This was a qualified exercise of the Federal power, by which the State was invited to cooperate and given power as an agent and trustee over the work. The grant was conditioned on acceptance of its terms by the legislature of the State; the lands were to be the property of the State "for the purpose contemplated in this act and no other"; were not to be conveyed or disposed of "except as said improvements shall progress", that is, the

State might sell sufficient to produce twenty thousand dollars, and after the half of that sum should be expended, sufficient for another such sum, and so on from time to time; the improvement to be commenced within three years after admission of the State and completed within twenty years, or the United States should be entitled to receive the amount for which any lands should have been sold; and the improved rivers and canal were declared a public highway, for the use of the government free from any toll or transportation charges.

At the first session of its legislature, the State accepted the grant as made, and, a few days later, created a Board of Public Works, and devolved upon it the duty of making the improvements out of the proceeds of sales of lands. The legislature was prohibited, by its Constitution, from contracting debt for or becoming a party in carrying on any internal improvements; and the Board, by the issue of certificates of indebtedness which pledged the proceeds of the grant when realized, raised money for a while to a considerable sum, until some embarrassment ensued and the credit of the State became involved.

After about five years trial in this way, the legislature created a corporation, The Fox and Wisconsin Improvement Company, conferred upon it substantially all the powers, rights and authority the State had over the subject, together with the lands granted by Congress and the works of improvement so far as constructed, and required it to pay the debts contracted by The Board of Public Works and to execute the trust imposed by Congress and accepted by the State. It thus shifted upon this agent its trusteeship for the General Government.

After this change, Congress made an enlargement of the grant by the act of August 3rd, 1854, and the joint resolution of March 3rd, 1855.

This Company, pursuant to legislation therefor, mortgaged by deed of trust all the lands granted, its franchises, water powers, and the entire property of the improvement, first, to pay the state debt and complete the work, and, secondly, to secure an issue of bonds to the amount of a million and a half of dollars. But it failed in the enterprise, owing it is said to the panic of 1857

and the outbreak of the Civil War, the mortgage was foreclosed, and in 1866 the purchasers of the entire property organized, under legislative authority, the corporation which is the plaintiff here, The Green Bay and Mississippi Canal Company, and it thereupon assumed and was invested with the trusteeship of the State to the Federal government. Large sums of money were expended by these companies, but their works of improvement were still incomplete, and public opinion throughout the West invoked the interposition of the nation to exercise its full powers and assume entire control of this highway between the Mississippi and the Great Lakes.

And Congress, responding to this sentiment passed the act of July 7th, 1870.

By this enactment it first authorized the secretary of war "to adopt for the improvement of the navigation of the Wisconsin river such plans as may be recommended by the chief of the bureau of engineers"; and then to ascertain "the sum which in justice ought to be paid to the Green Bay and Mississippi Canal Company, a corporation existing under the laws of Wisconsin, as an equivalant for the transfer of all and singular its property in and to the line of water communication between the Wisconsin river aforesaid, and the mouth of the Fox river, including its locks, dams, canals, and franchises, or so much of the same as shall, in the judgment of said secretary, be needed"; providing for that purpose a board of arbitrators; and required that before any expenditure of money on the improvement, the Company should file its agreement to grant and convey to the United States the franchises and property before mentioned, "upon the terms awarded by the arbitrators"; reserving to Congress upon their report an election to take such property upon appropriation of the sum awarded. It was then enacted that all tolls and revenues from the improvement over current expenses and repairs should be paid into the Federal treasury, that tolls should be reduced to the least sum required for operation and repair after the government should be reimbursed for its outlays; and that an annual report should be made by the Secretary of War of the progress toward completion, the expenditures and

revenues, and the amount required for the succeeding fiscal year.

The arbitrators appraised the then present value of the entire property and franchises at $1,048,070—although the Company proved the cost to have been beyond a million more—deducted therefrom the total amount realized from the sale of granted lands, $723,070, and awarded as a purchase price for the whole $325,000, of which the sum of $145,000 was ascribed to the franchises, dams, locks, etc. constituting the entire line of improvements, $140,000 for the water-powers, and $40,000 for the personal property,—dredges machinery etc. employed in construction.

The Secretary of War reported to Congress that the personal property was not needed for public use. He also expressed his opinion "that the franchises of said corporation, that are appraised by said arbitrators at the sum of $140,000, are not required for purposes of navigation and are therefore not needed." Congress in the River and Harbor bill of 1872 appropriated $145,000 accordingly; and by its deed, dated September 18th, 1872, the Company—having been specially empowered by an Act of the Legislature so to do—conveyed to the United States

"All and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and franchises, saving and excepting therefrom and reserving to the said party of the first part, the following described property, rights, and portion of franchises, which in the opinion of the Secretary of War and of Congress are not needed for public use, to-wit:

First, the personal property, etc., * * * *

Second, also all that part of the franchises of said Company, viz.: The water-powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same; all subject to the right to use the water for all purposes of navigation as the same is reserved in leases heretofore

made by said Company, a blank form of which attached to the said report of said arbitrators, is now on file in the office of the Secretary of War, and to which reference is here made, and subject, also, to all leases, grants, and assignments made by said Company, the said lease, etc., being also reserved herefrom. Together with all and singular the hereditaments and appurtenances unto the above granted and described property, rights, and franchises not so saved and excepted or reserved belonging or in any way appertaining, and all the estate, right, title, interest, claim or demand whatsoever of the said party of the first part, either in law or equity, either in possession or expectancy of, in and to the above granted property, rights and franchises not so saved, excepted or reserved, and their hereditaments and appurtenances."

By this contract the United States and its trustee, the plaintiff in error, established their new relation to the Fox river, the former assuming the entire ownership of the works of improvement, excluding the further intervention of the State or any other agency, and undertaking the immediate and entire control. Since that time, year after year, appropriations have been regularly made for maintaining, repairing, rebuilding the works of improvement, for new constructions, and for damages caused by overflow of adjacent lands, until over three millions have been thus expended; and engineers of the army have been continually in charge under direction of the Secretary of War.

In the language of this Court adapted from the case of *Wisconsin vs. Duluth*, 96 U. S. 586,

"We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and" works of "improvements started" under its authority by the State on the Fox river, "and a taking exclusive charge and control of it. That they amount to the declaration of the Federal government that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands

and subject to our control. If the merest recital ot these acts of Congress, and of the War Department under them, do not establish that proposition, we can have little hope of making it plain by elaborate argument."

And without here contrasting them in detail, we submit that the acts of appropriation and their administration by the War Department in the case of the canal at Duluth were by no means as significant of the assumption of exclusive and paramount control by the Federal power as those in the case of the Fox river, which have been summarily referred to.

4. Considering thus the nature of the Government's right and power over this public navigable river, as the prerogative of a sovereign, supreme, paramount, exclusive of all interfering authority, it would seem too obvious for debate that when Congress assumed its control, caused to be built canals and works of improvement to increase its usefulness for navigation, and, at the same time, authorized a corporation to participate the advantage of the public works by the use of the water-power they create upon terms agreed between them, the corporation's enjoyment is necessarily under the acts of Congress, subject to the authority and sovereign pleasure of the Government, and the measure of its rights or privileges a Federal question. No interfering authority can be tolerated between the Government and its allowed associate to determine the extent and character of the rights and privileges it has permitted the latter to exercise. The particular manner or form in which such an association is created by the Government is of little or no moment. The substance of the fact is, that the Congress by acts of legislation has authorized this corporation to enjoy certain rights and privileges in connection with public works which it has caused to be constructed, which the United States entirely own and over which their authority is paramount and exclusive. It matters not that in doing so, the Federal legislature has recognized prior acts of the State or previous transactions and agreements, in which the corporation's rights and privileges had their

origin, and to which reference must be made to ascertain the meaning of the acts of Congress and the terms and limitations of the corporate rights under those acts. In so far forth as such prior arrangements are material to the question, Congress is to be deemed to have adopted them, by implied reference, as definitive, instead of otherwise giving particular expression to the terms of the association. They are important to aid the interpretation and attain to the full meaning of the Congressional legislation, but the corporation's rights and privileges remain in existence not because of the former transactions, but because Congress has agreed to their future enjoyment under Federal authority; and whatever vitality remains in the prior statutes and transactions as definitive of such rights depends now on the enactments of Congress. The powers of the corporation to use the water, since the United States acquired complete ownership of the works of improvement and exclusive control of the river, must exist entirely under the authority of the Federal government; whatever their origin to the Company, their present derivation is from the United States. It is wholly inconsistent with the nature of the Federal authority, and inadmissible from every standpoint of Governmental rights and interests, to impute to the Congress the establishment of a partnership between the Government and this corporation, in which each of the two associates derives its powers from different sources, so that the Government is in alliance with a corporation beyond its control, or whose rights can be maintained and asserted in other than Federal tribunals. It would be a treaty, not a contract, if such were the nature of the concert; to be made only with an independent power. And were that possible it would not alter the argument; for, even then, it would be from the treaty or contract of partnership that the corporation must still derive its power to exercise its rights, and reference to that contract must be made for the company's authority. Its rights must in any case exist under the acts of Congress and the authority of the Government.

These considerations show the inadequacy of the argument on this subject of counsel for defendants in

error. They contend—they are of necessity limited to the contention—that the Company's right to the water-powers "was derived wholly and exclusively from the State of Wisconsin." Brief of *Fish and Cary* on Motion to Dismiss; p. 27.

But this confuses the rights of the past with the rights of the present; and fails to discriminate the real source of enjoyment of the rights as they now are. True, in the beginning, the plaintiff did not hold under the United States, except as the State was acting in their behalf in executing the act of 1846. But when the Government dispensed with its intermediary agent or trustee, shut the State out of all authority by taking exclusive control of the river, and bargained with the corporation to give it the right to enjoy certain uses of the water, the relation between the Company and the Government became immediate and direct. The obvious purpose of the act of 1870 was to assert the full authority of the Government over this river, and, while so taking possession, to make just payment for the plaintiff's interests under state legislation, whether bound so to do or not. But its execution led to a bargain, ratified by Congress in the act of 1872, by which the Government granted to the plaintiff the right thereafter to use the water-powers created by the works in the river which it thenceforth owned entirely, and from the control of which all authority but its own was excluded. It cannot be tolerated by the Government that this Company thereafter remained in possession of rights in that water under any other authority than its own. It is idle to attempt a distinction upon the theory of an exception merely in the grant, and to say the Company derives no license from the Government by the bargain between them. The case is in no manner different in substance from what it would have been had the Government, after having first taken ownership of the whole without exception, given the same use of the same water-powers to another corporation; or to this one by a subsequent grant of them. The form of words by which the arrangement was effected, does not alter the nature of the arrangement. The authority of the United States over the subject, the necessary derivation of the privileges in the use of the water from that authority, cannot be distinguished in the two cases.

The assertion that the plaintiff holds now under the State of Wisconsin "wholly and exclusively," or in any independent manner, by which results the exclusive power of the State Court to adjudge the measure of the plaintiff's rights in the property, is answered by that very consequence. For if the measure of those rights is not a Federal question, but exclusively for the State, then it would be as possible for the State Court unreasonably to sustain encroachment on the National rights, as in this case unreasonably to have limited them within their just boundary. Such a doctrine is inconsistent with the dignity of the Federal Government and the principles of National self-preservation. Another state court might show undue favor to the state creature.

It brings more clearly into view the force of these considerations, though it may not add to it in reason, that the particular dam whose water-power is involved in this suit, has been in great part reconstructed anew by the Government since it entered upon management of the river; and thus the privileges belonging to the plaintiff in it have been recreated by the Government since the association with the plaintiff was entered into, and are in a sense, the direct product of the Government's work.

The assertion in the same brief, pp. 29–30, that "It is perfectly clear that the plaintiff in error did not derive any title, right or privilege to the water-powers in question under either of these acts" of Congress which were pleaded by the plaintiff and are here insisted upon as the basis of its rights, seems, therefore, to rest upon failure to understand the nature of the transaction to which they gave vitality, or to disregard a true perception of the relations it established.

In another brief on the Motion to Dismiss it is "respectfully submitted that this is another to be added to the long list of cases which have been brought to this Court from courts of the various states where the questions decided below were mere matters of common-law cognizance, or involved only the construction of state statutes"; to which is added citation of the doctrine that construction of a state statute by its highest court

is binding on this Court, with reference to many of the cases which have ruled it, as if the element of examining the state statute in the opinion below excluded jurisdiction here upon this record, by controlling the judgment of this Court.

Brief of Mr. Ordway, p. 33.

In point of fact the opinion of the State Supreme Court does not, when accurately analyzed, seem to turn on construction of the state statute, but upon other, and, as we think, misleading and inapplicable considerations.

But, granting its judgment to rest on a construction of the Statute of 1848, the fact ought neither to occlude the Federal question nor conclude the opinion of this Court upon it. That Statute is of importance in this case only because the authority given by the United States to the plaintiff to use certain water-powers created by its works of improvement carries for its understanding of what those water-powers are, what their date, extent and limitations, necessary reference to the history of the improvement, the tracing back of which brings out that Statute as an ancient landmark. As a law it has in most particulars long been obsolete, its main provisions were repealed over forty years ago, but it serves justly to assist in understanding the bounds of rights which the United States have in general terms authorized the plaintiff to enjoy. The case is in principle on this point the same as if the United States, having become sole owner of the entire works of improvement had, by its deed of grant, conveyed to the plaintiff "the water-powers created by the dams, as they were provided to be held by the State of Wisconsin and by the State afterwards granted to the Fox and Wisconsin Improvement Company." The necessary inquiry what are the water-powers, as so held and granted, is the none the less a Federal question because involving the local law for its decision, than if it involved only a Federal Statute, Congress had the right to describe the privileges it chose to grant the plaintiff —or its special grantee in the case supposed—by such terms as it deemed adequate and appropriate, and the obligation on the Court is only to discover what it

meant to convey; the nature of the question is not changed, nor does jurisdiction fail, because of its reference to local statutes for the definition of the right.

Congress might define the location of a light-house or other public work by words which should require reference to a plat or map, made by a state or some municipal officer of it, to ascertain the prescribed site. It would be thought little less than preposterous to assert in such a case that, therefore, the authority given was not Federal, the extent of it not a Federal question, or that absolute deference was due the judgment of the State Court in interpreting the state plat. It is equally clear that when a local law becomes important incidentally or collaterally in determining a Federal question, no submission is due by this Court to the State tribunal; but that such a law, like the common-law, particular usages, local or class, or whatever other sources of information or aid to judgment, this Court will inquire into and pass upon for itself.

"So far as the judgment of the State Court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this Court, whether that question depends upon the constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence" said this Court, speaking by MR. JUSTICE GRAY, in *Stanley vs. Schwalby*, 162 U. S. 278-279, citing several cases decided here.

5. While, as already said, the form of contract is of small significance, yet it seems clear enough that by the technical principles of conveyancing, the plaintiff takes the rights now in question by the reservation in its deed, not as an exception, but as something taken back out of the thing granted, and thus derives its right in strictness of law from the deed.

In construing a deed to determine whether the thing saved be by way of exception or reservation, much less weight is given to the terms employed than to the nature of the subject and of the provision made by the grantor.

Stockwell vs. Couillard, 129 Mass., 231.

Therefore the considerations we have discussed are entitled to much effect in the interpretation of the instrument which gave expression to the contract, so that it shall be read according to its character.

This deed contains the appropriate words both of exception and of reservation; and justly so, because both exception and reservation were made in it upon the grant, in the general terms by which it was described. Plainly the personal property was excepted, simply; and so, perhaps, the "lots, pieces or parcels of land necessary to the enjoyment" of the water-powers. But one could hardly find a better illustration of a reservation than of "the water-powers created by the dams and by the use of surplus water not required for the purpose of navigation with the rights of protection and preservation appurtenant thereto", taken back out of a grant by the corporation of the "locks, dams, canals and franchises" as part of "all and singular, its property and rights of property in and to the line of water communication" etc. When Sheppard's Touchstone, always quoted, says that a reservation "doth differ from an exception, which is ever a part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before", it is not meant that the thing reserved had no prior existence as part of the thing granted, but that it had no existence separate, distinct and independent of the thing granted; it is a new estate, right or easement carved out of the granted estate which existed before only as part of the whole of that estate. Thus, here, ownership of the dams gave all the ownership of the water-powers they created, but, by this deed, out of these dams which were granted was carved a new estate, right or easement, the ownership of the water-powers independently, with rights of protection and preservation, all theretofore inhering in the property granted to the Government, and not before separated from the entire estate.

Where an easement or charge upon the estate previously existed as the right of another, to reserve it in a grant of the estate charged would amount only to an exception because it was before a distinct thing *in esse*. But a reservation is to *the grantor*, charging for the first

time the estate granted with the servitude created by the reservation as a distinct and independent right, distinguished from a right formerly inhering with the estate as a part of it; and precisely such was the reservation to the plaintiff of the water-powers with the "rights of protection and preservation appurtenant thereto."

3 Washburn on Real Property, 640; 645-647; original paging. "In this country" says Washburn, page 645, "the cases are numerous where the thing reserved is some easement, privilege, or benefit, out of the granted premises other than and different from the thing granted, and yet nothing like a rent or return by the grantee, to be by him paid or delivered to the grantor."

Illustrations of a reservation will be found in *Dyer vs. Sanford*, 9 Met. 400; where a right to light and air to a window on land adjoining that granted was *reserved*.

Putman vs. Tuttle, 10 Gray 48; where "the wood and trees" on part of the granted estate constituted the *reservation*, and impliedly carried "the use of the land for their growth and nourishment and for cutting down and removing them."

Marble Company vs. Ripley, 10 Wall. 339; where a right to enter and take possession of the granted premises to take marble, in case of the breach of the grantee's agreement to supply a stipulated quantity was the *reservation* and recognized as such.

6. The objection that the right of the plaintiff under the United States was not sufficiently set up appears untenable according to many decisions by this Court. The facts out of which the rights arise were pleaded as the basis of the plaintiff's claim, the deed to the Government with full recital of the several acts of Congress was made a part of the pleading *in extenso*, and the adverse decision necessarily involved the very question which has been shown to be a Federal one. In the brief of Mr. Stevens, filed in the State Supreme Court in behalf of this plaintiff, then respondent there, upon the appeal from the first judgment of the Superior Court of Milwaukee county, the explicit claim in the directest terms was set out that the Company based its claims upon grant of power by the United States; and,

though that be no part of the record, it avails to show that parties well understood what the record imports and the just claims arising from the facts duly pleaded. The right of review by this Court seems beyond doubt upon its previous decisions.

Kaukauna Co. vs. Green Bay, etc. Co., 142 U. S. 269.

California Bank vs. Kennedy, 167 id. 362.

Record, Amended Answer, pp. 75–76.

II.

THE RIGHTS OF THE PLAINTIFF.

Before entering upon the discussion of the judgment complained of, it will be convenient to state the nature and history of the water-powers which the Government has authorized this Company to possess; briefly summarizing the facts at the Kaukauna rapids, the action of the State and the power it exercised.

The controlling facts are not obscure or doubtful, and for the most part are stipulated by the parties or within judicial notice.

Record, pp. 333–340.

1. The dam and works of improvement at Kaukauna were begun by the State board of public works and finished by the Fox and Wisconsin Improvement Co., according to a plan adopted by the former; Congress having in terms authorized the State to determine the plan, which duty by the act of 1848 the legislature devolved on the board.

The river there flows in an Easterly direction, with a fall of about fifty feet over rapids of nearly a mile and a half in distance to naturally navigable water below; and the improvement consisted of a dam so constructed as to carry down stream at uniform level a long reach of the water of the pond, thence to descend through five locks, each of ten feet lift, in a canal which thus connected the smooth water below with that above. The dam began some distance above the rapids by an embankment along the low South shore to prevent overflow on that side, extending in length about seventy-five rods and rising in height gradually down stream from a low beginning to about eight feet above the level of the ground. It then turned across the river to a point near the North shore, where it turned again and thence continued down stream parallel with the North shore until after about eleven hundred feet it united with that

shore, while the channel so formed was continued by excavation inland along the bluff that bounded the river for twelve hundred feet farther to the first lock. Provision was made for the spill of water over the section that crossed the river, which was accordingly built to less height than the embankment extending down stream. The latter was composed of a heavy stone wall and earth filling, and, in part to provide that filling, some excavation from the natural North bank of the river was made along the first eleven hundred feet; while from that point this channel was wholly made by excavation contiguous to the bluff and within the shore line, with a high levee or embankment on the river side, leaving a margin of land between it and the natural edge of the river shore. But the flow of the river was thus first held up at the first lock, so that the water stood at the same level throughout the pond as it extended from that lock through the channel so created to above the spill section; and the first descent was made through that lock into the canal below, and after that through a succession of pools with intervening locks to the lower navigable water of the river.

The width of this channel averages one hundred and fifteen feet or thereabouts; its capacity is indicated by an average cross-section of about 605 to 610 square feet; and it appears to have been supposed and intended by the original builders to be sufficient to carry the main ordinary flow of the river. Record, pp. 379-80, 411. In point of fact, it is sufficient to carry perhaps little more than half of it.

At the head of the channel, adjacent to the turn in the dam from the spill-section down stream, there was in the beginning constructed a pair of gates, called a "guard lock," from an apprehension that floods might injure the works below, so that the gates could be closed in such an emergency. They served no other purpose, and experience proved them entirely needless. They do not appear to have ever been closed, and were in some way broken out or taken out sometime prior to 1866 and never replaced. Record, p. 395.

In 1876, the Government, which had become owner in 1872, built an entirely new spill-section to the dam, lower down than the State had built, and at a still more

oblique angle to the river, the South end being forty feet below the former South end—the South shore embankment being extended accordingly—while the North end joined the down stream dam 110 feet below where the old one turned.

The Improvement Company bought (besides sufficient grounds for the construction of the improvement) the North shore margin of the river, lying between the high channel-dam and the stream (as it supposed, though it some time after transpired that the conveyance carried but an undivided half of the title), and in 1859 platted that ground conveniently for the use of the power created by the dam and works of improvement, into twelve mill lots; and since that year the public taxes have been assessed against that Company and its successor, the plaintiff, according to the subdivisions of that plat.

During the period of its ownership and possession, the Improvement Company sold outright some water-powers along the river, and made leases of others; the proceeds of all which were applied to the cost of the improvement. So, likewise, the plaintiff, since its succession to ownership, has put the water-powers to use, as new enterprises and increasing manufacture, stimulated gradually by growth of population in the west, has created demand for such power. In short, all available powers of dams and works of improvement have been from the beginning put to use as rapidly as practicable, under the conditions of capital and business inevitably governing such use.

From this particular dam at Kaukauna, the only lease made by the Improvement Company was to Cord and Gray, in June, 1861, of one hundred horse-power for sixty years, at a nominal rent of one dollar per year and the taxes, to be used for a flouring mill upon lot three of the plat. This lease was surrendered in 1882.

Subsequently, from 1869 on, the plaintiff has made ten or eleven leases of varying quantities of power to be drawn to wheels on others of those lots, or upon islands; of which eight remained in force when the testimony was taken, providing for use of 1,760 horse-power to operate mills and an electric light plant.

Record, p, 365.

2. When the United States first made provision for the improvement of the river by granting lands to the State to defray the cost, it authorized the State legislature "to adopt such kind and plan of improvement on such route" as it conceived for the best interest of the State. Unquestionably the State, or its agent, the Improvement Co., afterwards this plaintiff, was authorized to exert the same full sovereign power and prerogative which the United States might have done; whether by virtue of this authorization or in its independent sovereign character. It could entirely divert the water of the Fox from the South Channel or the Middle Channel of its natural flow, to pass through the North Channel or through the canal, which is practically but the North Channel improved, without regard to the riparian proprietors below or compensation to them for any loss they might sustain.

Transportation Co. vs. Chicago, 99 U. S. 635.
Monongahela Navigation Co. vs. Coons, 6 Watts & Sergt. 101.
So. Carolina vs. Georgia, supra.

"Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard."

bson vs. United States, 166 U. S. 276.

This principle has been equally recognized in Wisconsin, although as a general rule—not applicable to this case, as hereinafter shown—the riparian owner's title is bounded by the middle thread of the stream; and the Supreme Court, by Chief Justice DIXON, speaking of *Jones vs. Pettibone*, (2 Wis. 319) in which that rule of boundary was first declared, said in 1872: "But it was also held in *Jones vs. Pettibone* that the title of the purchaser to the center of the stream was taken subject to the public easement or right of passage in navigation, and *when the nature and extent* of this easement or right are considered, *it will be found for this purpose to be almost or quite immaterial whether he is regarded as holding to the center of the river or only to the margin of it.* This easement, or right of the public to regulate,

control and direct the flow of the navigable waters, to impede or accelerate such flow, to deepen the channel or to remove obstructions from it, or to change the direction of the current from one bank of the stream to the other, or *to make an entirely new channel*, and, in short, to do anything within the banks of the stream itself which may be considered for the benefit and improvement of commerce and navigation, will be found to be *a most extensive and absolute right*."

See *Wis. Riv. Imp. Co. vs. Lyons*, 30 Wis. 65.

Similar discussion will be found in *Arimond vs. G. B. & M. Canal Co.* 31 Wis. 338.

See, also, *Cohn vs. The Wausau Boom Co.*, 47 id. 322.

It was in the exercise of this prerogative over a navigable water, not in exertion of the right of eminent domain, that the dam was constructed by which, when the water it raised should come to be entirely employed, whether in the service of navigation or in the use of its power by gravity, the flow of either of the three natural channels below the dam would be seriously diminished or perhaps entirely interrupted. It is not of importance, therefore, in order to understand the true measure of the rights acquired by the exercise of this sovereign prerogative, to dwell upon the limitations which attend the right of eminent domain or the mode of its exercise. It tends rather to bewilder than elucidate the question.

There can be but one question when the manner or extent of the exercise of this power of Government comes under inquiry before its tribunals, and that is, Has it been legitimately used without abuse of the discretion necessarily vested in the administrative branch? If that be answered affirmatively the consequences of its use to riparian proprietors cannot in any degree limit or restrain the action of the officers or agents of the Government.

That question, as it concerns the manner and extent of the exertion of this power upon the Fox river, this Court has already determined in the affirmative in the case of the *Kaukauna Water Power Co. vs. This Plaintiff*, 142 U. S. 254; in which it was said by Mr. Justice BROWN speaking for the Court:

"If, in the erection of a public dam for a recognized public purpose there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian proprietors were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian proprietors themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties *and thus reimburse itself for the expenses of the improvement.* The value of this water-power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors who had not the means to make it available. These proprietors lost nothing that was useful to them except the technical right to have the water flow as it had been accustomed and the possibility of their being able some time to improve it." p. 273.

And again: "So long as the dam was created for the *bona fide* purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water-power, the agents of the State are entitled to a great latitude of discretion in regard to the height of the dam and the head of water to be created, and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement." p. 276.

When this case was adjudged the entire history of the improvement and the legislation of the State, to-

gether with the circumstances of this plaintiff's connection therewith and title to the water-powers, were fully before the Court, and there is nothing in this record to alter or affect the question as it was then presented.

3. The right to the surplus water-power created by the dams and works of improvement which the State so reserved to itself, it employed precisely as in that opinion its right to do was adjudged. It granted them to the Fox and Wisconsin Improvement Company to "reimburse itself for the expenses of the improvement."

In the beginning by the act of 1848 which directed making the improvement through the Board of Public Works, careful and adequate provision was made to secure to the State the entire water-powers which might be in any manner produced by or result from the works to be constructed. Section 16 of that act, reads:

"Sec. 16. When any land, waters or materials appropriated by the board to the use of said improvements shall belong to the State, such lands, waters or materials and so much of the adjoining land as may be valuable for hydraulic or commercial purposes shall be absolutely reserved to the State, *and whenever a water-power shall be created by reason of any dam erected or other improvements made on any of said rivers such water-power shall belong to the State subject to future action of the legislature.*

More ample words to secure all possible resulting water-powers could not be necessary.

But the embarrassment entailed by the limitations of the State Constitution and the soon-discovered impossibility of providing enough money by sale of the granted lands to meet the necessary expenditures, very early turned the legislature to an effort to make the value of the water-powers contribute to the cost of the improvement; and during the period while the board of public works was struggling with its task, the legislature passed the act of February 9th, 1850, by which the board was authorized in any future lettings of contracts to consider bids "for improvements which will create a water-power, and when such person or persons offer to

perform, or perform and maintain, the work in consideration of the granting by the State to him or them, his or their assigns forever, the whole or a part of such water-power; Provided, That before such bid is accepted and the contracts entered into, it shall receive the approval of the Governor;" and in case future maintenance was a part of the consideration, security was required for performance of that obligation.

And also:

"When lettings have been made for the improvement of said rivers, whereby a water-power is created, the board of public works may relinquish to the person or persons who have performed the same, all or a part of such power as a consideration in full or in part for such performance or maintenance of such improvement, or for both; *provided*, That such relinquishment shall also receive the approval of the Governor and be made after receiving security as provided in section two".

App. to Mr. Stevens' Brief, p viii.

The repeated careful provision for trading the whole, or a part only, of any water-power, with a future or existing contractor in payment for his work, is further evidence of the completeness of the reservation previously made of the entirety of every water-power resulting from any part of the works of improvement; as well as manifests the economical spirit governing the legislative action and its struggle for means to prosecute the work.

Chapter 340 of the laws of 1852, which authorized the issue and sale of stock certificates, redeemable out of the proceeds of the lands granted or receivable in payment for them,—a species of French *assignats*—as well as similar provision in the contract with the contractor Martin, exhibit further attempts to provide money to enable the State to go on itself with the performance of its undertaking.

Canal Co. Doc's. pp. 31, 30, c. d.

But all efforts failed to meet the exigency, and, at length, in 1853, the necessity for securing some agency which could provide means independently, led to the

arrangements which found expression in the act of July 6, 1853.

App. to Mr. Stevens' Brief, xii.

By that act certain persons named, their associates and successors, were created the corporation called "Fox and Wisconsin Improvement Company"; next it enacted that the works of improvement contemplated in the acts of 1848 and its amendments "together with all and singular the rights of way, dams, locks, canals, water-power and other appurtenances of said work, also all the right possessed by the State of demanding and receiving tolls and rents for the same, so far as the State possesses or is authorized to grant the same, and all other rights and privileges belonging to the improvement, to the same extent and in the same manner that the State now holds or may exercise such rights by virtue of the acts referred to in this section, are hereby granted and surrendered by the State of Wisconsin to the said 'Fox and Wisconsin Improvement Company'"; followed by provisions securing free use to the United States and limiting tolls, etc., *upon condition* that each of the members of said Company should, within thirty days, file with the Secretary of State a bond or bonds to the State in the sum of $25,000, to be duly justified on oath, conditioned vigorously to "prosecute the said improvement to completion, and complete the same within three years from the passage of this act, on the line located by the board of public works and as contemplated in" their report and estimated by the chief engineer, etc., and should pay the contractors the estimates to become due them from time to time and any damages awarded them; and should "pay all outstanding evidences of indebtedness on the part of the State as trustee or otherwise issued on account of said improvement, as the same shall become due, or if now due, within ninety days after demand upon said Company, and further conditioned to save harmless the State of Wisconsin from any and all liabilities in any wise arising or growing out of the said improvement, law or laws in relation thereto"; and besides it was then specially required that before possession should pass to the Company it should first procure and file

with the Secretary of State complete releases, by five persons and firms named as the several contractors on the improvement, of all claims and demands against the State for work done or damages claimable under their contracts. And then, only after the bonds and releases should be so filed, the Company might take possession.

Argument cannot be here necessary that this act and its acceptance constituted an inviolable contract between the State and Corporation, that the grant was upon sufficient consideration and *in presenti* passed the title, and that it was intended to convey, and did convey the entire water-power which should "be created by reason of any dam erected or other improvement made" as the legislature had formerly reserved the same to the State.

Discussion of this proposition, indeed, and all recapitulation of the subsequent legislation, judicial proceedings and other transactions has been rendered superfluous through recognition of their effect by the parties in the following stipulation in the Record, p. 335:

"It is admitted that the Green Bay and Miss. Canal Company has succeeded to the title of the State and the Fox and Wisconsin Improvement Company as to the work of improvement *and all the hydraulic power which the State or Fox and Wisconsin Improvement Company owned.*"

4. It thus appears that the works of improvement were constructed in the legitimate exercise of the power to improve the river, and have been found and adjudged open to no judicial criticism; that the riparian owner has, therefore, no claim to compensation or other ground of complaint for such diversion as they make of the waters of the river through the new channel, the extent of such diversion being within the discretion of the State which devised the plan; that being so rightfully built they afford a surplus of water beyond the needs of navigation at the present time available for manufacturing power, that such power belonged to the State and its disposition of it was legitimate and proper to reimburse itself for the expenses it had incurred and to provide for the completion of the improvement, and

that the Federal Government has since taken and is now in direct charge of the navigation upon the river.

Does not the conclusion appear natural and irresistible that the water-power to be enjoyed by the Government's license consists of so much water conveniently applied to wheels as the Government will at any time, or from time to time, permit to be drawn from the works of improvement as the surplus not required for navigation? No other limitation upon the quantity of the power available to use has ever been prescribed; it was necessary to prescribe no other. It was as competent for the State to reserve the whole as any part. When the State enacted the act of 1848 and the works were built, but two interests and two parties were concerned or entitled to be heard on this question; the interests of navigation, always ultimately in the supreme control of the United States, on one side; the State on the other, interested that the incidentally resulting water-powers should be as valuable as they reasonably and lawfully might, first, thus to contribute more to the cost of the improvement for which the lands granted in aid of it were inadequate and, secondly, to build up and promote the manufacturing and business prosperity of a region within its borders to which Nature had furnished such, if properly employed, a powerful auxiliary. Against the plan for this work so legitimately devised and built, no claims of any riparian proprietor, present or future, stood in the way. No such claim could qualify the rights of the State and the United States, as they arranged them mutually to be. Riparian proprietors possessed no rights, not perfectly and completely charged with this servitude. If the works were then legitimate in purpose, and execution followed accordingly, the rights so declared were established, and established forever as against the riparian proprietors affected. It cannot be possible to question this proposition without obvious violence upon the rights of the State in the beginning and the obligations of the contract made with its grantee. What was legitimately done then possesses forever the sanction of the law.

Such being the rights of ownership of the plaintiff, the method of their enjoyment would not seem doubt-

ful or difficult of definition. The owner may use his own in such manner as shall be convenient, and when he will, so that he does not in such use invade the rights of others. The water in the dams and other works of improvement which the United States suffers to be drawn, may, therefore, be taken at such point in the works as the Government designates as most convenient not to interfere with navigation. Subject to that limitation or definition of boundary, ownership of the full measure of the power in the works of improvement, with all the incidents of ownership, has been in the plaintiff's predecessor and itself since the grant of it by the State. It was not necessary to its continuance that all the power should be immediately applied, more than that the ownership of land requires it to be occupied and cultivated. It was enough to assert the full rights of ownership that water was drawn, as it has been for over thirty years, when and as the owner could find employment for it; and there is no pretense of claim that it has not been put to use as rapidly as that condition offered opportunity.

No complaint or objection is interposed on the part of the United States to the plaintiff's use and enjoyment of the water power in question.

Such, in brief summary, would seem the natural and legal deductions from the power exerted, the manner of its exercise, and the terms of the acts of the State legislature. It remains to set forth the views which the State Supreme Court in the judgment complained of has now taken to the contrary; and to show that they are not only unsupported by sound reason, but in reality reverse the previous decisions of that Court itself, consistently carried through a long prior period.

5. Before going further it is desirable to note the narrowness of the ground upon which the defendants can only stand for the assertion of their claims to interrupt the use of this public work according to the law of its creation.

"It is admitted that the State has never taken any

affirmative action to authorize any person or corporation to build and maintain a dam across the Fox river at the Kaukauna rapids excepting the act of 1848, and the act of 1853 organizing the Fox and Wisconsin Improvement Company, and other acts relating to the improvement of the Fox and Wisconsin rivers."

Record, p. 334.

Since 1841 it has been a statute of Wisconsin that "all rivers and streams which have been meandered and returned as navigable by the surveyors employed by the Government of the United States are hereby declared navigable so far as the same have been meandered to the extent that *no dam*, bridge or other obstruction *shall be made in or over the same without the permission of the legislature.*"

Chap. 9, Laws of 1840-1841. R. S. 1849, ch. 34.
Chap. 41, R. S. 1858. Chap. 70, R. S. 1878.

The Meade and Edwards dam, from which the defendants, the Patten Paper Co., the Fox River Pulp and Paper Co., The Union Pulp Co. and the Kelso mill, all take their power, the only dam here contesting with the plaintiff, was built in 1879 and 1880.

Record, pp. 27-28.

This dam was built, therefore, not only without authority of law but contrary to the statute of the State applicable to this river. In the case of the Kaukauna Company the Supreme Court of Wisconsin speaking to this claim of right by that riparian owner said succinctly: "A riparian owner upon a navigable stream has no right, without legislative consent, to build a dam across such stream for any purpose. *Wis. R. Imp. Co. vs. Lyons*, 30 Wis. 61." It was built after the Government had rebuilt that part of the Kaukauna dam which crosses the river, and in full view of the conditions existing, and with knowledge of the rights of the plaintiff under the public acts of the State and the United States.

It is obvious that these defendants have no standing as owners of a dam below to contest the plaintiff's

rights. They have in such character sustained no injury of which they can complain. It is purely as riparian owners claiming only "the technical right to have the water flow as it had been accustomed" that they now appear to challenge the rights of the State whose laws they have themselves violated; and as speculators upon that "technical right" to add to an enjoyment of the water which they can only have in disregard of law.

III.

THE ERRONEOUS JUDGMENT.

The rights of the plaintiff-in-error as thus presented, it will require but brief examination to see are substantially destroyed by the judgment to which the writ of error ran. That judgment the State Supreme Court declared an execution of its opinion given at the preceding hearing upon appeal and, in legal effect, its own judgment. Record, p. 580. First, upon motion of the plaintiffs below, it apportions all the water of the river, save what navigation requires, to run through the three old channels named according to the proportions of its flow in a state of nature and enjoins all interference therewith. Then upon motion of the Kaukauna Water Power Company, and other defendants in error, it adjudges "that the water-power which was created incidentally by the erection of said dam at Kaukauna is due to the gravity of the water as it falls from the crest to the foot of the dam proper across said river," denies all right to draw water for power from that part of the dam in the new channel or canal, and further adjudges that this plaintiff, "its successors and assigns, shall so use the water-power, if at all, created by said dam as that all the water used for water power or hydraulic purposes shall be returned to the stream in *such a manner and at such place* as not to deprive the appellants (such defendants-in-error) and those claiming under or through them *of its use as it had been accustomed to flow past their banks*, and that it *shall* flow past the lands of said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants have the right to use the water of said river except such as is or may be necessary for navigation as it was wont to run in a state of nature without material alteration or diminution."

Record, pp. 555-6.

The alarming destructiveness of this judgment will be at once recognized in the fact that it prevents use of the power at the only place where at Kaukauna it has ever been enjoyed,the place where from the beginning thatenjoyment was looked for, and summarily dooms many factories and mills many years engaged in profitable manufacturing, representing the investment of large sums of money and long the source of livelihood of numerous working people. Nor at this point on the river alone; but also in several other localities where a similar use of the water has long maintained mills and factories of more extensive character and usefulness. Not only the plaintiff, but their lessees, whose enterprises have been not more to their benefit than a public advantage, and the community dependent on them, are involved in the ruin so menaced. But a small part, at best, of the vast natural forces of the Kaukauna rapids, belongs to the plaintiff, and it is doubtful if any whatever would remain under this judgment of sufficient manufacturing value to recompense the cost of making it available. The Kaukauna Water Power Company, believing that no mill can be so placed as to use any of the water and return it "to flow past their banks" "as it was wont to run in a state of nature without material alteration or diminution", rejoices in its practical triumph over the decree of this Court; and to them who know the real situation, the mocking irony of the words inserted superfluously in the State Court's judgment seems little like the voice of justice. Yet needless though their office there, it was shrewdly written in the prescription of future enjoyment of its remaining rights, "that said Green Bay and Mississippi Canal Company, its successors and assigns, shall so use the water-power, IF AT ALL" &c. And the disaster of this judgment is sharply signified by the expectation thus cropping out of it in this gratuitous and exultant hint.

For the theory of law which leads to such a result, we must turn to the opinion of the State Court. The gist of its argument is, that nothing can be regarded as the dam creating power but that section of the actual structure which lies across the natural current of the river; therefore nothing be the water-power created but the gravity of the water as it falls from the crest to the

foot of the dam at that point; that the State, and its grantee, took no right to any power but as riparian owners, and that lower riparian owners consequently can compel the reserved water-power to be used at that point only and in strict subjection to their rights of flow and use below as the river was in a state of nature.

This does violence alike to the laws of physics, the statutes of the State, the previous continuous line of decisions of the State Court itself, the authority of the Government, and the vested rights of the plaintiff.

I. The Century Dictionary defines "dam" as primarily, "a mole, bank, or mound of earth, or a wall, or a frame of wood, constructed across a stream of water to obstruct its flow and thus raise its level, in order to make it available as a motive power, as for driving a mill wheel; such an obstruction built for any purpose, as to form a reservoir, to protect a tract of land from overflow, etc.; in *law*, an artificial boundary or means of confinement of running water, or of water which would otherwise flow away." Secondarily, marked as obsolete, "the body of water confined by a dam."

That part of the embankment extending along the South shore might be called a dam, as defending the land from overflow. But so much of it as crosses the river is, taken alone, no more the dam than any other thing which should merely obstruct the current.

But it would seem undeniable that, in every fair sense, the dam which creates and maintains a reservoir of water to be thence drawn off for use, must embrace every part of the containing structure, embankment or wall, essential to the maintenance of the reservoir as built, as the entire body of water so embraced and held to the same level within such reservoir is the dam of water. "The fundamental property of water and all other fluids is, that a pressure applied to any part of their surface is transmitted equally in all directions throughout the entire volume of the fluid." The exterior shape of the confining wall is immaterial. The two turns or bends in the course of the embankment from its beginning at the uppermost point on the South shore to its end at the first lock, do not alter the physical

law, nor ought rightfully to alter the law of the case. In the view of neither law, does the dam differ in effect from what it would have been had the obstructing barrier run in a straight line from the South shore to the lock; in which case it would have seemed preposterous to single out only that part made lower than the rest to afford a spill of the waste, as the only portion to be named the dam, or be treated as such.

It is correct enough, in common parlance, to speak of the reach of water extending in the one common reservoir from the turn in the dam to the lock, as a canal; but it is entirely incorrect to be thereby misled into denying its character as essentially part of the reservoir itself. The embankment which contains it was built on the bed of the river at considerable distance from the natural bank, and in continuation of the structure of the dam where it crosses the river. The latter part did not alone dam the river in the sense of the statute, because by it alone without the lower embankment no reservoir would have been created. In fact, a great share, probably nearly half, of the waters of the reservoir as it exists is contained within that lower stretch of it. The embankment which crosses the river, like the embankment along the South shore, operated only to restrain the water so far and to turn it into the new channel devised for it. The flow was not dammed so as to raise a reservoir until it met the barrier at the lock, whereby it was thence set back up stream into that part of the pond which lies above the spill section. The dam thus began at the lock, and was by force of the barrier there first created into a reservoir. Had the new channel been sufficiently large to carry the entire stream no accumulation of water, no other effect than the diversion of the stream, would have resulted without the dam at the lock; and the same is true as it is, but only in less degree.

Being the right of the Government to build, in whole or in part, a new channel for the stream, even altogether artificial, it was equally its right to place its dam in that channel at whatever point was regarded most advantageous to the lawful objects in view, and it is mere perversion to assert that the dam consists only of so much of the work of improvement as turned the water into

the new channel to entire disregard of that part of the work which really dammed the flow and raised the reservoir.

It avails nothing to the defendants to recur to the original device of the guard gates, because in fact they made no real difference, being always open, designed only for an emergency and never used; and for more than twenty years before this suit was brought they had been entirely removed, and thus all rights were the same in fact as if they had never been constructed. Besides, the United States, after taking possession, rebuilt the dam and changed the plan in this respect some years before the Meade & Edwards dam was built below, in the exercise of lawful power, and thus fixed its character as it is at this time; and no private party can object to it as so built or to any effects it yields for incidental power so long as the Government is satisfied.

Until its new departure by the judgment under review from its long course of former decisions, the Supreme Court of Wisconsin had no difficulty in recognizing the correctness of the view here taken of the proper relation of dam and canal as an instrument of hydraulic power. The case of *Lawson vs. Mowry*, 52 Wis. 219, was a controversy relating to a similar water-power drawn from the canal part of a dam similarly constructed where the river issues from Lake Winnebago at Menasha; Lawson being owner of the particular power under a lease for 99 years, renewable forever; and that court then said of this subject by CASSODAY, J. (p. 237):

"It was the legislature which gave the authority to obstruct the channel of the river by the building of the dam and canal, and to make use of the water-power thereby created for navigation and the surplus for hydraulic purposes. The water-power thus created by the dam was *not necessarily confined to the use of it at the dam*. It is common to conduct water from a pond created by a dam by means of artificial channels, in order to make available the increase of the head by reason of the additional fall in the bed of the stream below the dam. The embankment or land between such artificial channel and the bed of the stream is, nevertheless, *as necessary to preserve the water-power as*

the dam itself. It is, in effect, nothing less than a wing of the dam. The canal, down as far as the lock, is in effect nothing less than an enlargement or arm of the pond created by the dam."

In any view, it is apparent a dam was most assuredly created in the new channel, and if the spill section be the only dam of the old river, the dam at the lock is none the less, therefore, one of the dams of the improvement by which a water-power was created; and however the State Court may now refuse to recognize its being an integral portion of the river dam, it is true, at least, that all the water-power raised by any dam the State reserved and the plaintiff owns, if any effect is to be given to the statute. The State possessed the right to put the river in a new bed, in whole or in part, and none the less to dam it there, with all incidental results.

2. In any case, it seems undeniable that the State Court failed to give due force to the words of the statute of 1848 which it recognized as defining the right in question. For it not only limited the power to be taken to what it erroneously designated the dam, but to do so, it likewise limited the statute, to the entire exclusion of the force of an unmistakable and significant clause in it. Not only "a water-power created by reason of any dam" but just as much "a water-power created by reason of * * * *other improvements* made on any of said rivers" was reserved and granted. And when the nature of the subject is reflected on, it must be apparent that these words are peculiarly applicable to a canal, and doubtless the canals to be built in connection with the dams were the very "other improvements" specially in view, although words comprehensive enough to save every water-power however raised were employed. In point of fact, no water-powers have been—it is difficult to see how any otherwise could have been—created but by dams or canals, either separately or in conjunction. Whatever may be true definition of the water-power at that part of the structure which the State Court now chooses to call the dam, it would seem impossible to deny, in the face of over thirty years user of it, that an entirely available and most useful water-

power was created by the dam at the first lock in the new channel or "canal." Precisely such were the valuable water-powers leased from her canals by the State of Ohio which were in controversy in *Fox vs. Cincinnati*, 104 U. S. 783.

Such also was the power in every circumstance drawn from this improvement at Menasha, which the State Court so naturally and correctly recognized in *Lawson vs. Mowry* just quoted from. Mainly such are the powers all along this improvement at Menasha, Appleton and other points, upon which are dependent in large measure the business enterprises of one of the most thrifty, intelligent and prosperous regions of our country, the Fox river valley. Among the earliest leases made by the State, was one for 30 years, before the Improvement Company was created, of the power at the Fox river end of the canal between that river and the Wisconsin near the ancient, long-famed "Portage," all of the water for which was drawn from the Wisconsin through the canal and fell some ten feet into the Fox. This power the board of public works was specially authorized to lease "on such terms as they may deem most for the interest of the State, but which shall not in any wise injure the navigation of said canal" by the 3d Sec. of the Act of April 19, 1852; also directing the proceeds to go to complete the work. See App. to Mr. Stevens' brief, p. v. And when in 1850 the legislature repealed the board's authority to reserve State lands on which settlers had made a claim, it expressly provided that the repeal should not "apply to any water power created by the construction of the canal or the improvement of the navigation of the Fox and Wisconsin rivers, and so much land adjoining the same as the board of public works may deem necessary to form a part of said water-power." (Same appendix, p. iv.) Thus the legislature not only distinguished between a true canal and other works of improvement but manifested its clear purpose to secure *all* water-powers created by either.

Why then was not the water-power in question equally reserved by the statute of 1848? Undeniably it was, unless the statute is invalid. But its validity has been adjudged by this Court, as already shown, in the

Kaukauna Water Power case. The opinion of the State Court — not, seemingly, with entire openness — states, however, that it was then decided that the plaintiff "is the legal owner of all the water-power which has been created by *the dam at the head of the rapids at Kaukauna* beyond what is required for navigation, and that it has all the right and title in that water-power which the State acquired in it under Section 16 of the act of 1848, and that such title amounts to entire and absolute ownership." Record, p. 543. It is true the invasion by the Kaukauna Company then under inquiry was through the embankment on the South shore above the rapids, but not a word in the opinion of this Court indicates any purpose to limit the validity of the act or the rights of this plaintiff to "the dam at the head of the rapids." Instead it states the question then for decision to be the validity of the act of 1848 "in so far as it provided that the water-power created by the dam erected *or other improvements made* on the river, should belong to the state." 142 U. S. 271. Nor is there in it a word to indicate that any difference was seen between the cases, or that the reservation of the power created by other improvements is less valid than that of the power of the dam. The statute was adjudged a valid one and the reservation effective, with no exception whatever. Being so, how can the valuable water-power in this "other improvement," called the canal, be less effectively saved by it, than any other?

The State court seemed to recognize that this must be so, if a water-power were created there by the works of improvement, and to meet this makes the argument which is quoted at length, to fully present it, that "the water-power which was created incidentally by the erection of the dam is due to the gravity of the water as it falls from the crest to the foot of the dam. What further power it may have in its present distribution is not incidental to the erection of the dam, but such as has been added to it from deliberate design. The first reach of the canal to the first lock did not create a water-power. No power existed there until the bank of the canal was cut for the very purpose of creating it. Until then all the water of the stream not required for navigation passed over the dam. There it created a

power which was in a true sense incidental to the erection of the dam. The power created by the cutting of the canal was not incidental to the erection of the dam or the construction and use of the canal for navigation, but was *ex industria* for the purpose of creating a water-power. It was created for its own sake and not incidentally. So far from being an incident to the lawful public improve ment, it is in derogation of the public improvement. It impedes rather than aids the navigation of the stream".

This carries a seemingly sententious sound, but, upon examination, will be found, it is submitted, neither consonant with the reason of the matter nor with the plain principles of justice.

In the first place, this theory of water-power, for any such uses as the act of 1848 manifestly contemplated, ignores in its extreme narrowness of view the essential elements and ordinary circumstances of such a force. In the practical sense, a water-power consists of a head of water so accumulated at some point that it may be applied profitably to turn the motor wheels of machinery. It is obviously incorrect to say that the only water-power created incidentally was due to the gravity of that water which falls from the crest to the foot of the dam. In point of fact, the water that so falls is wasted and yields no power. Nor is it in anywise the necessary measure of the power. It is quite immaterial where the spill of the waste occurs; or, indeed, that there should be any, as, in the case of streams so small that a few hours use consumes the accumulation of twenty-four, there is often no spill. There are, also, many most valuable water-powers, where the waste is discharged over a low fall far above on the river the place where the useful head is accumulated and employed. The true measure of the power is the fall to the tail race at the point where the water is drawn from the reservoir and applied to the wheel. It is a coincidence, in a sense accidental, if that occur at the same point where the spill of the waste occurs, so that the latter may also measure the force.

Nor is it essential to the existence of a water-power or its full measure, that it should be used. Clearly, the water-powers which the statute reserved to the State

for its future disposition, were such accumulations of water in the works of improvement, as should be created, and available without affecting navigation, at the most effective and profitable points for manufacturing purposes. These have no relation to the spill of the waste, which should of course be located most conveniently to the general operation of the works. A reservation of the power of the spill only would have been ridiculous, in the common sense of hydraulics. By every fair intendment, the statute sought to save the most profitable product of the improvements, in order thereby to secure the most money towards their cost. To impute less to it not only denies good sense to the legislature, but detracts from the plain meaning of their words.

These undeniable considerations manifest the error of the surprising assertion on which the attempt to elude the statute is founded, that "the first reach of the canal did not create a water-power". Recognizing the necessity of explaining this, in view of mills having long used two thousand horse power thence drawn, the opinion follows it up with another: "No power existed there until the bank of the canal was cut for the very purpose of creating it". A more surprising explanation than the assertion it qualifies! Obviously, the reservoir was tapped only to apply the power therein accumulated. The dam at the lock, with the containing banks created the power. It was just such power, to be some time later applied, that the statute reserved to the State. Contrast these statements with the opinion that the only power created was by the gravity of the water spilling from the crest of the dam. Was it intended, indeed, that no power could be enjoyed but by employing the force of the spill of the waste itself? For, by the same reasoning, no other power was created there, nor can be until the dam shall be cut to draw it upon wheels; and such an application, being the new creation of the State's grantee by the act of tapping the dam only, cannot therefore under this reasoning be available in any case to the plaintiff. Or would there have been a water power at the dam by the lock, if a spill for waste had been there provided? Perhaps there was; the record is silent on that important point. There often is such in works of the kind.

And of what significance to deny the force of the statute, which reserved all the water-power created by the dam or other improvements, is the statement that until the embankment was tapped "all the water of the stream not required for navigation passed over the dam?" If proven—and the record is silent on it—it was due only to a lack of demand for the water-power which had been created. Were that a controlling fact, the power at the cross dam is still more effectually lost, because there it has never been put to use. Yet that, the opinion says, "was in a true sense incidental to the erection of the dam." Plainly, it was no more incidental there, considered on the theory the opinion seeks to enforce of matter of fact, than the power raised by the dam at the lock was incidental to that dam. Nor was it so great, useful or valuable, in any desirable sense; so much within the obvious purpose of the statute. The fall gained at the latter dam exceeds the former by eleven feet.

The State Court also regards the cutting of the canal embankment as an additional creation of power "by deliberate design." The "deliberate design," however, was no new one. It was the legislative design of 1848. It is apparent from the history of the improvement that it was designed from the beginning to employ the water-powers created at the most effective and useful points of advantage. That employment necessarily waited demand for them; but as early as 1859 ground was provided and platted into mill lots alongside the canal in anticipation of the demand, and there the first lease was secured, at only a nominal rental, as a hopeful introduction. From the power created by that dam at the lock, every mill has been supplied which the seekers for such power have built. It would be as just to deny right to power created by the portion of the dam lying across the stream, were it to be now tapped to get it, by imputing its creation to that act as a deliberate design to gain further manufacturing force from the river. With like confusion of ideas and syntax it might then be charged, in the words of the opinion, that "the power created by the cutting of the" dam "was not incidental to the erection of the" works of improvement "or to the con-

struction and use of the " dam " for navigation, but was *ex industria* for the purpose of creating a water-power. It was created for its own sake and not incidentally. So far from being an incident to the lawful public improvement, it is in derogation of the public improvement." The words would have similar truth in the one case as in the other.

It cannot, we submit, be successfully maintained that the reservation of the statute is less applicable, in reason or in terms, to the power created by the accumulation of a head of water in that part of the dam within the reach down to the lock, than to the far smaller power resulting from the accumulation above the spill section.

Nor does the opinion strengthen its theory of hydraulics by the attempted appeal to the interests of navigation. Those interests are in Federal charge, now; and so long as the Federal authorities discover in the permitted use of power no interference with navigation the State Court is called on to abridge no rights on that account, especially when attempted only for the benefit of riparian proprietors. The interests of navigation have nothing to do with the assertion that no water-power was created by the dam at the lock until the embankment was cut to apply it, or that such power was incidentally created only by the portion of the dam which lies athwart the stream.

In fine, it seems clearly impossible in any view of the facts to deny that the terms of the statute of 1848 embraced the water-power created by the dam at the lock, whatever name be given it. Against any such theories as are presented in the extract from the opinion above commented on, the statute must maintain itself and maintain the plaintiff in its granted rights. The United States being satisfied, no such interpretation of physical facts avails to misconstrue the law.

But it will have been observed by the Court that all this argument of the State Court is tinctured, if not confused, by a theory of law which is responsible for it and now requires full and direct consideration.

3. The State Supreme Court holds that the Government takes all its rights to the water-power, when any

is created by works of improvement on a navigable river, merely as a riparian proprietor and subject to the limitations on its use which would obtain between upper and lower individual proprietors, and that such limitations are a constant and continuing restraint on every use of the water, except for purposes of navigation; so that, it would seem, every statute, no matter how plain in terms, must be construed as meaning no more, or that every excess of legislation beyond such meaning is invalid.

This is the keynote of its opinion, inducing the faulty assertions above discussed; and if this doctrine be erroneous or inapplicable, nothing substantial in the judgment is supportable.

The theory of the State Court is original with it. It will be observed no authority is cited by the opinion in its support. Nor was any produced by counsel applicable to works of improvement built in the exercise of the power exerted in this instance or relating to navigable waters of interstate commerce. All their illustrations were drawn from cases where the power of eminent domain was exerted upon private waters not Federal. The question, as now presented, is entirely novel and must be determined for itself by those principles which peculiarly affect the subject. It is a question of high importance; far less to plaintiff and its dependents on this river, great as is their interest, than to the Government and the public. The improvement of water ways in this country has but fairly begun; the future may see immeasureably greater works under this power.

Two sentences of the opinion indicate the argument of the State Court. "It is by no means clear that this statute [the act of 1848] invested the State with a title more absolute or with rights more extensive or exclusive in the water of the stream than would belong to the owner of both banks of the stream who should have erected the dam for the purpose of creating water-power. Such a private owner would own the water-power created by the dam absolutely and entirely, subject only to the public right to divert the water required for navigation". Record, p. 554.

It will be the attempt of this argument to show that

these ideas invert and confound the principles which govern the power by which the State built the improvement. The Government possesses no authority, as a riparian proprietor, to take possession of a navigable river of the United States in order to build works "for the purpose of creating water-power." Nor when the private owner of the banks rightfully builds a dam for his own use, is it charged with any servitude to supply water to some other channel for purposes of navigation; although it be true that the Government can at any time enter upon and improve a navigable river of the United States without more regard to the riparian owner's use of the water than it chooses to award him. A correct distinguishment of the principles of the law properly applicable leads, as it seems, to a very different conclusion.

In the first place, the Governmental power by which the improvement was made was, as has been seen, one which required no recognition of riparian owners as entitled to any rights in the water of this navigable river. They possessed no such rights whatever, as against the Government. The river was "the public property of the United States." As such it was taken possession of, and that possession was exclusive, exhaustive, paramount to all other claims or privileges. It was taken possession of in good faith to build extensive and costly works, to make new channels for the movement of the water of the river, with dams, locks, excavations, or what ever else was deemed desirable to the scheme for promoting navigability. No impeachment of the full power exerted is, or ever has been, possible. The public money was expended in honest pursuit of the public end. And to nothing which was so lawfully done could any riparian proprietor interpose the least objection. No right of his was in any wise invaded.

It would seem to follow necessarily that when the Government so builds works of improvement on "the public property", at its own cost, often heavy, the product is, necessarily must be, in all particulars and for all uses, the Government's own, completely and perfectly, with all the attributes of ownership. No sound reason

can circumscribe its powers of ownership and use. Rather should the Government's proprietorship be accompanied with greater authority than a private owner's, because designed to subserve the public interest and promote the welfare of all. It is easy to conceive cases in which much inconvenience and public harm might ensue, were such not the law. Had railroads not impaired the fruition of the general expectation when this improvement was projected, its importance to the Fox might already be great. And public works are probable, in no distant future, where the value of this rule may be signal. It may happen that instead of a part, the Government will in some instance find it convenient to divert the entire flow of the river through a new, artificial stream, in which the necessary dams and locks will create available water-powers, properly applicable to the cost. It would be a vexatious if not intolerable servitude were such work subject to the surveilance of former riparian owners on the old stream. Were that the law, every riparian owner at whatever distance below might at any time, or from time to time, challenge the Government's use and disposition of the water. Nor, in such view, could the Government by any proceeding of condemnation ever free itself from the liability to harassment. The Government's ownership should stand under no such limitation or qualification. The works being rightfully built belong with all their advantages and incidents to the public owner. The action of the Government in such a case may be, possibly, open to challenge for abuse of the power professedly invoked, upon ample proof it was fraudulently and colorably resorted to in order to private and inadmissible objects. But that need not be discussed. No such question is open here, and whenever properly raised its determination in favor of the Government concludes all question as to incidents as well as the principal subject. The right to use the available water-powers, in partial recompense for their cost, is as absolute at this point of time as any other right in them. It is no longer under the ban as not a rightful Governmental power. It now is such, attached to and inherent with the primary right under which they were built; nor is it to be abridged because not strictly the use which the purpose

of their construction was primarily to subserve. The right of use must be now co-extensive with the opportunities afforded for enjoyment by the works as built, as fairly for the one object as the other, the primary always maintaining its place.

It cannot be left open, after the validity of a legislative act of this kind has been fully considered and supported, to judicially administer the distribution of the water between the different uses to which it may lawfully be put, or to regulate its use for either purpose, in order nicely to save what may not be strictly necessary to either so that the utmost possible of waste shall flow along the banks of shore-owners below. Administration of such works must be left to the public officers to whom Congress has committed it. The Court will not substitute a marshal in their stead. All questions of this kind should be deemed concluded by the statute and its proper execution by the proper authorities. The same principle must obtain as in the case of a legislative determination in reference to obstructions in such waters. In the *Gibson* case, the court, speaking by the Chief Justice, says that the power to regulate commerce includes "the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation." So, likewise, it would seem inevitably necessary that the same power, by which, also, improvements in aid of navigation may be made, must include power to determine what water is required to flow in the channels built for the purpose, without which navigation might be obstructed, and what out of such flow so required may at any time be suffered to go to the uses of manufacture, either at any time, or from time to time. In short, that all water which lawful works properly built under a valid law shall take into them of the water of a stream must be deemed *in the judgment of law* properly so diverted; and the manner in which it is employed, the place where it is carried back to the stream, as all similar circumstances, equally within the conclusive presumption.

This must be so, entirely so, or it must follow that it will be, for a jury, or different juries, from time to time to determine the necessities and proper uses, nay, even the sufficiency or propriety of the plans, of the improve-

ments for which the Government provides its Bureau of skilled engineers.

In the words previously employed, all the attributes of ownership attach fully and perfectly to works of the Government lawfully built in public waters.

Nothing less than this, it is respectfully submitted, results from the former decisions of this Court in the Kaukauna Water Power Company's case. "There was every reason," justly says that opinion, "why a water-power thus created should belong to the public rather than to the riparian owners." Nothing less, indeed, can result from the settled doctrine of this Court in many cases relating to the navigable waters of the United States recently discussed and reaffirmed with clearness and vigor in *Gibson vs. The United States*, before cited.

Nor, in truth, as shall presently be shown, can the decision of the Supreme Court of Wisconsin in the Kaukauna Case be taken to have meant any less, or to comport in any wise with its subsequent judgment now under review.

A most important reason lies in the plain necessity that the Government should exercise an unvexed control over the use of all such works of improvement. They are not made for temporary purposes but for enjoyment through an indefinite future. The full capacity of this improvement may come within the needs of navigation at no distant day. Conditions and modes of intercourse are continually changing, and recourse to water routes of communication, temporarily lessened, is not unlikely to be much increased. But, however that be, the rule of law and public policy must be uniform and adapted to the possible exigencies of all such cases. The control of the flow of the river, the use of the water for navigation, and the apportionment of it to that purpose or to incidental power, including the points and method of such employment of it, must remain with the utmost freedom in the administrative authorities of the Government. It is a right of government which cannot be open to continual legal controversy. Were it not so, were riparian owners in superior right to the Government in respect to the use of water for power, litigation might be incessantly

asserting new rights as changes in the volume of the stream or in the demands of navigation should alter from time to time the quantity of the surplus to be measured by the courts. It is a right of the Government alone to license the use of the water for power, and it must be for the Government to say when, where, to what extent, in what manner, any such water may be drawn from its works, and control of its licensee must remain in its hands, not in riparian proprietors seeking only their own gain. As the Supreme Court of Massachusetts said in *Newton vs. Perry*, 163 Mass. 321, "It would be an unjust refinement to say that the right is only to do such things from time to time as a court or jury may think necessary then." With this principle in view, this court said of this very improvement, in the opinion already quoted, "Indeed, it might be very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation."

It is no answer to say that the contention in this case does not affect the Government, because it relates only to the surplus above the needs of navigation, or concerns only the interest of this plaintiff. It is a direct invasion of the authority of the Government and its right of control. The question is abstractly, what might the Government lease or sell. The fact that a gross transfer has been made to the plaintiff, subject to Governmental snpervision, does not alter the legal aspect of the case from what it would have been had the Government given this plaintiff a particular lease of the water-power, or a specified quantity of it, created by the dam at the upper lock. If the latter would not be subject to defeat at the suit of a riparian proprietor, the plaintiff's rights cannot be; if so subject, the control of the Government over the matter is gone, and every lease or sale of power in any such case must be chargeable with continual controversy from riparian proprietors; which is, of course, to submit the Government thereto. The opinion of the State Supreme Court is, in fact, direct to the power of the State, or Government, denying it the right to use for itself, to sell or lease to others, any water not required for navigation, except subject to all limitations which riparian proprietors below may at any time impose by demanding all such

surplus as then happens to exist, to flow along their shores in its accustomed way. Thus not only control of the surplus, but the constant inquiry what is surplus under existing conditions at the time, is turned over to the court and jury.

Sound public policy can not tolerate such interference with the public interests on a navigable highway which the Government has assumed complete and exclusive possession and management of. It would not only destroy utterly the value of a water-power so created, depriving the Government of its right to require from it in some part its expenditures by deterring capital from its use, but it would be likely to involve the Government in continual litigation to defend the interests of navigation.

Another, and it would seem, controlling consideration grows out of the fact that when the law of 1848 was passed, the entire subject of the rights of riparian owners to the waters in such a stream was within the absolute disposition of the legislature. During the territorial period the "more correct rule," as this Court called the boundary of high water mark in *Barney vs. Keokuk*, 94 U. S. 338, prevailed, sovereignty being in the general government. Upon the admission of Wisconsin, that sovereignty was transferred and it was for the State to determine the extent of the title of the riparian owner, as repeatedly decided by this court.

See *Shively vs. Bowlby*, 152 U. S. 140-46, where the cases are exhaustively discussed.

The state came into the Union in May 1848, and up to the time of the passage of this act—in fact for a long time after—no statute or decision of the court had awarded to the riparian owner any interest below high water mark. The case of *Jones vs. Pettibone*, 2 Wis. 308, decided in 1854, at the December term of 1853, (which the opinion shows had but little consideration, important as it was) is the leading case and the origin of the general rule of ownership in the State to the thread of the stream.

It was consequently, beyond dispute, within legislative competence to pass what law it would at that time

concerning the waters of the Fox river, either to exert the right of the State as owner of its bed and waters, or to yield up its title in the stream to riparian owners, subject to the public easement. And, although, as has been shown by the decisions of the State Supreme Court as well as of this court, the public easement under the latter rule is abundantly adequate to all the purposes of this improvement and its incidental powers, yet it would seem to remove every vestige of fair argument against the right of the State and its grantee, to reflect that at the time of the passage of the act of 1848 the title of riparian proprietors ceased at high water mark, and the definition of their rights in the water was wholly within the power of the legislature.

The State then enacted *the law* governing the navigable highway between the Mississippi and the Great Lakes. It was due, and peculiarly so at that period, to this route of intercourse which had been a special object of National care in the Ordinance of 1787, and of express stipulation in the then recent enabling act of Congress—for the general words there employed from the old Ordinance have exclusive reference in Wisconsin to this highway—as well as to the grant then just made by Congress for its improvement, that, whatever might be done with others, the Fox and Wisconsin rivers, so far as embraced in this route should be entirely appropriated to the advancement of its usefulness and the peculiar rights of the State to their waters withheld from disposition to riparian owners. And in appropriating to the use of this improvement, with the view of adding to the means for its accomplishment, the waters of the stream so far as they should be available to the powers incidentally created by it, the State took only that which was within the public right, and excluded riparian owners from rights which might interfere. It took with completeness all that was necessary for all the objects declared not only for navigation but for power. The act was a definition, so far forth of the rights of the public and the shore owners, and an assertion of the public right to so much of the waters of the river as should be required for the purposes of the improvement; either the primary purpose of navigation, or, when so connected in good faith with that, the

equally lawful ancillary and secondary purpose of making the water powers created by the improvement available in the fullest profitable degree to the public interest, by thus raising more money to promote the public object.

It is not to be forgotten that the reason why the State could not independently build works to create water-powers does not spring from the superior rights of private parties to the waters of a river, but from the fact that, taken alone, it is not a governmental function. But when that purpose is but secondary and helpful to the accomplishment of another strictly a governmental one, and requires only the making avail to the public benefit of necessary results of public expenditure, it falls within the lawful and proper functions of government; it is no longer open to challenge, and its promotion warrants the exercise of all reasonable and convenient means applicable to render it most beneficial. Not only so, but wisdom and just attention to the public welfare demand that so far as the public power is addressed to the secondary and subordinate object, it should promote rather than hinder its utmost usefulness, always subordinate to the superior and primary purpose. No just reason can be suggested why the State of Wisconsin was not charged with the duty as well as right to make the water-powers that should be created by the improvement of these rivers of the utmost available utility, provided the facilitation of navigation honestly ruled the plan and purpose of the works. The Constitution of the State contemplated this. It was written with knowledge of, and reference to the grant made by Congress in the act of 1846, and though it forbade the legislature to contract any debt for or make the State a party to carrying on the work as principal, it expressly declared "the State may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate *the revenues derived from such works in aid of their completion.*" The Constitutional Convention of 1848, and the legislature which assembled during the summer of that year after the State's admission, well understood the conditions affecting the new unsettled country through which this highway of Nature extended. They knew the

insufficiency of the grant to complete the great undertaking within the limited period, that it must be regarded as an aid only, and that necessity compelled the reach for every resource if satisfactory results were to be expected; and unquestionably the revenues to be derived from sale or lease of water-power were especially in the contemplation of the Constitution as well as of the act of 1848, the two bodies from which they issued embracing in their membership a number of the same men. It was entirely just, also, then to contemplate the advantages to the public which would ensue from attracting manufacturing enterprises to that region, and the provision thus for something for navigation to concern itself with; and the full development of all the powers the improvement, properly made, should produce was a proper object of public concern.

At that time, also, riparian rights, however defined, had such value only as they may have now on streams in Alaska. It was no injury to riparian rights then done, but the desire to recreate such rights now, that moved this controversy before the Courts.

Again, the Government in no sense builds as a riparian owner. Were it owner of both banks of a stream it could not therefore properly engage in building dams to create water-powers. Taken alone that is not a governmental, but a private purpose; and no authority exists for the expenditure of the produce of taxation for such objects. Its right to put works of improvement in a navigable stream in no particular springs from ownership of the banks; and therefore its rights of proprietorship in them with all their appurtenant or incidental advantages take no rise, and suffer no limitation, from its ownership of the shore. Many features of improvement may require no shore property. If, however, that be requisite for landing the ends of a dam, building a new channel, or otherwise, it is an accidental circumstance, not the source of power. In such case, to buy or to condemn the necessary land of private owners, is but to exert a merely ancillary authority; the improvement is carried on in exercise of a wholly different prerogative. When completed, the

rights of ownership are not peculiar to any point, hung to some spot of shore property, or different in character at different points; but must extend with equal vigor to every point and place, authorizing unqualified enjoyment at all points of all the beneficial uses the constructed works afford.

Obviously, also, to limit the State to the rights of enjoyment in the water powers which a riparian owner might have, and subject it to all the limitations chargeable under the opinion of the State Court in favor of lower proprietors, would be to practically deny all beneficial enjoyment. The riparian proprietor, dependent on ownership of the shores for the extent of his privileges, always secures to the utmost possible the banks on both sides; not only above for flowage, but below to the distance required to fully develop his power and apply it through flumes, canals or penstocks at the best advantage to motor wheels. The State could, indeed, condemn for flowage; *but it could not acquire land below* its dams and improvements. Its right to buy or condemn was perhaps limited to such land as was necessary to support or construct its works. If therefore it were bound to return the water not employed in navigation so as to flow in its accustomed manner along the banks below any dam, the return must be immediately made at the very foot of the dam, and practicable use of the power is impossible; the statute a barren thing. But if, having lawfully created valuable powers it could sell or lease them at convenient points, no ownership of land by the State was requisite for that purpose. In the one case, the riparian proprietor below would practically own the power since no other could use it. In the second, competition would leave the State the actual proprietor of a beneficial and remunerative property. It was of the essence of any such enjoyment that the State should have the right to lease or sell available power to any purchaser who could use it, and deliver to him on his own land by any convenient means. It was the Improvement Company, not the State, which could hasten and facilitate such returns by the purchase and platting of mill lots conveniently contiguous, and inviting the enterprise of capitalists. The State might,

however, have sold the use of the same powers to other owners of the same land. Considerations so obvious must have been in the mind of the legislature when it provided, pursuant to the new constitution, that the State should have the benefit of the works which were so built at public cost. They were just and reasonable. The public treasury ought not to be shorn of the chance for reimbursement of its outlays, or the completion of the work jeopardized for lack of funds, so to be realized from the product of its expenditures, because some future riparian proprietor might desire the water restored to the old channel for his private gain. As was said by this Court in the Kaukauna Water Power Company's case, the State was entitled thus to "raise a revenue from it sufficient to complete the work which might otherwise fail"; and that right must assuredly not be a mere nominal and barren one, but a lawful advantage accruing from its own expenditures, and ought, as has been said, in the public interest to be made available to the best and most remunerative results. True, also, perfectly so, was it then, as said by Mr. Justice BROWN, "the value of this water power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors who had not the means to make it available. These proprietors lost nothing that was useful to them, except the technical right to have the water flow as it had been accustomed *and the possibility of their being able some time to improve it*." But so much they *then lost*, necessarily; for the point of time to which this inquiry relates, justly regarded, is the time when the plan of the works was devised and the consequences declared by legislation.

It was, therefore, for the State, had it remained in possession, to have determined for itself where a water-power might, in view of all conditions at any time or from time to time, be made available to its profit in contribution to the outlays for the public interests. In like manner, now, it is for the General Government to so determine, and, although it paid this plaintiff as the price in part for property it bought of it, with the profits so to be gained, yet the plaintiff took subject, necessarily, always to that superintending authority.

4. It hardly needs be said that the cases where wholly private waters of rivers not navigable, or the waters of infra-state rivers not capable of interstate commerce nor within the Federal jurisdiction, have been taken by virtue of the power of eminent domain for aqueducts, canals or the like, are to be properly distinguished. Such waters are not taken as "*the public property of the United States*," in which no riparian proprietor holds any interest which the Government is bound to respect, but are taken as private property only to be appropriated to the extent which the right of eminent domain authorizes, and upon compensation made. In such cases the taking is limited and restricted narrowly to the public use which warrants the seizure, and the compensation, which is to be made at, or as of, the date of taking is estimated and reckoned upon the basis that no more shall be taken than the public use strictly demands. The power of eminent domain is invidiously guarded, because it is exerted against private property, and ought not to be used to take from one citizen his property to be bestowed upon another; and inasmuch as compensation is fixed at the time of the taking, and is necessarily limited to that interest or property only which is to be required for the public use, the injustice is obvious if more be afterwards actually demanded and seized.

But here the Government invaded no right of any citizen, and simply enjoyed what was strictly its own in appropriating the waters of the Fox to the uses of the improvement, whether directly to its increased navigability or indirectly to the promotion of that end by the use of the powers created by its outlays. It took nothing for which compensation was due the riparian proprietors and its rights are not measured by any theory or quantum of price paid. In short, the cases are entirely distinct, and the attempt to establish analogies or to reason from seeming analogies between them, may, as often happens, lead to vicious conclusions. The principles which relate to the public navigable waters of the United States are peculiar, and quite different from those that govern the waters of a State. Speaking of the confusion which once prevailed, this Court said in *Barney vs. Keokuk*, 94 U. S. 38: "It had the

influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy."

It would be again unfortunate, now that to some extent the effects of that error in judicial perception have been eliminated from the subject, if others were to be affixed or perpetuated, growing out of cases in States where the unsound rule of ownership has led to questionable limitations upon the public right.

It may be added that the further argument, strongly put in Mr. Stevens' brief, that were there a right in riparian proprietors below to compensation for water taken, the time to which it is referable and at which it was to have been measured, was the date when the State, in pursuance of public law declaring its full purpose, entered upon the work of building the improvement. That was the time of taking in legal judgment. Since then possession has been continuous and complete, "that is, all the possession which could be predicated of any water-power not in actual use as such, that is to say, possession of the dam over which, and the banks between which, the water runs", as was said by the Supreme Court of Wisconsin, in the case of the *Kimberly & Clark Co. vs. Hewitt*, 75 Wis. 374, speaking of a water-power of this improvement. New condemnation and appraisement were not requisite when the declared uses of the works came to be enjoyed, or from time to time as more water was diverted to carry more vessels or to turn more wheels. Being so, the rule applied in the Kaukauna Water-Power Company's case must equally govern here, that if the riparian proprietors affected neglected to avail themselves of the provisions made for compensation they stand in no attitude now to interrupt the declared and lawful uses of the improvement.

It is enough, however, for this controversy that such proprietors suffered the loss of no rights, nothing having been taken but what belongs strictly to the Government to enjoy as of public right and for the public good.

5. The judgment under review was a departure from the long well settled line of decisions by the Supreme Court of Wisconsin and especially from the principles directly applicable to this controversy which had been enunciated by that Court in the Kaukauna Water Power Company's case, which this Court affirmed.

In *Denniston vs. The Unknown Owners*, 29 Wis. 351, that court considered the relations which the State and its agent, the Improvement Company, held to this work, and determined that the lands granted in aid of it though transferred to that Company were not subject to taxation. In the case of this plaintiff vs. Hewitt, 62 Wis. 336, the Court said: "The State was bound to discharge the trust it had assumed by accepting the grant for that purpose to construct and complete the contemplated works for the improvement of the Fox and Wisconsin rivers."

In no instance before this last one, and many have invited expression, has that Court ever qualified the right of the Government to the full ownership and enjoyment of all the fruits of its expenditures upon such a work of improvement or failed to recognize the full extent and nature of the public right in navigable rivers.

Besides those already referred to above, in *The Stevens Point Boom Company vs. Reilly*, 46 Wis. 243, that court speaking by RYAN, C. J., said: "This subjection of the private right to the public use may sometimes impair the private right or defeat it altogether. But the public right must always prevail over the private exercise of the private right."

And quoting this in *Cohn vs. Wausau Boom Co.*, 47 Wis. 325, the same learned judge added: "As against the riparian owners, within the limits specified in the statute, *the State has only resumed its own.*"

In *The Black River Imp. Co. vs. The La Crosse Booming and Transportation Co.*, 54 Wis. 659, the Court sustained the right to entirely close up and cut off the Black Snake river, a navigable channel or arm of the Black river for the improvement of the latter.

In *Attorney General vs. Eau Claire*, 37 Wis. 400, and again in another case between the same parties, 40 Wis. 533, it was, as Mr. Justice BROWN says in the Kaukauna

Case, "broadly held that where the State was authorized to erect and maintain a dam for a public municipal use, the legislature might also empower it to lease any surplus water-power created by such dam."

Without pursuing farther in other cases the uniform former course of the Court on the subject, it is enough for present purposes to show the completeness and sufficiency of the principles declared by it in reference to this improvement and the rights to its use in the case of this plaintiff against the Kaukauna Water-Power Company.— The head notes to the report of that Case contain the following:

After recital of section 16 of the act of 1848, "*Held*,

(1) The State took the *absolute ownership* of *all* water power *so created*, and *not merely so much thereof* as existed *upon lands owned by the state*.

(2) The act was not invalid as to surplus water power over and above that required for the navigation of the river on the ground that it took private property for private use. The surplus water power was merely incidental to the improvement, and the control thereof was necessary to the proper management of the improvement."

And though it was found that the act of 1848 made inadequate provision for compensation of property taken, it was also "*Held*, that the defects in the act of 1848 have ceased to be of any importance as affecting the rights of the present owners of the surplus water power."

An examination of the opinion (70 Wis. 649) will show that this summary of the decision is fully supported by it. Speaking there of the contention against the ownership of all the water-power, the argument being in all essentials the same as now made by counsel for defendants here, the Court said: "We cannot adopt this construction. The statute absolutely reserves to the State the property belonging to it mentioned in the first clause, and at the same time confers upon the State the water-power therein mentioned; that is to say, such water-power as should thereafter be created 'by reason of any dam erected or other improvements made on any of said rivers" (including the Fox river), *which otherwise did not belong to the State. This was*

necessary in order to give the State the absolute control of the improvement and such is the plain reading of the statute."

And again, speaking of the contention that the act of 1848 "is invalid as to the surplus of the water-power *over and above that required for the navigation of the river*, for the reason that it is taking private property for private use, which is beyond the power of the legislature", the Court said: "Here, also, we are compelled to differ with the learned counsel for the defendants. It was necessary to erect the Kaukauna dam for the purpose of making the river at that point available for navigation. Without it slack water navigation would have been impossible. It was of vital interest, therefore, to the State that it, or the corporation to which it entrusted the preservation and maintenance of the improvement, should have *the entire and absolute control of the dam, embankments, canal, and all appliances necessary for the purposes of navigation*, as well as of *the waters* in the pond created by the dam".

It was to the credit of the judge who wrote that opinion that he drew attention to the Federal question involved and expressed his desire that the judgment of the State Supreme Court should be reviewed by this Court; which upon error fully justified the confidence entertained of the correctness of its conclusions.

It is true he inserted in the opinion *ex majori cautela*, though it is said upon request of counsel at the bar, a statement that "we do not determine here the relative rights of the plaintiff and other riparian owners below the dam, in respect to the use of the water which would run over the dam if not taken from the pond into the canal; nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam." This was eminently proper, since no other parties were before the court. But it was by no means an intimation—as it seems to have been taken—that the same principles would not be applicable to that question when parties should present it. So far from this was the fact that in a subsequent case, relating to another point on the river, between *The Kimberly and Clark Co.*, which took its rights from the plaintiff here, and *Hewitt and others*, who are defendants here, the Court said again:

In the case of 70 Wis., above cited, it was held, after much deliberation, that the Canal Company is the owner of such surplus water-power. The correctness of that ruling is vigorously challenged by the able counsel for defendants. * * * We are satisfied with our conclusion in the *Kaukauna Case*, and must therefore adhere to it. This case is not distinguishable therefrom in principle. Having held that the Canal Company owns the surplus water-power *created by the improvement*, we must hold that it owned the surplus water-power here in question, and that it has effectually conveyed it to plaintiff, as it lawfully might." 75 Wis. 337-38.

It needs not be said that the judgment of a Court is to be regarded as a persuasive authority in other cases for the principles of right it enumciates and establishes, and that effect is given to it only as effect is given them in future application. The principles of that judgment, intelligently understood, abide as authoritative upon the rights to which they apply. They were then clearly grasped and declared. Whatever the change since in the membership of the Court, the law is not changed, nor the legitimate consequences of it as then settled.

This court found the law was then correctly determined and is not bound to pursue the State Court in any devious wandering from it, except to reclaim and restore the rights of suitors impaired or lost in such error.

And when it is recognized as law that the State had full right to reserve all the water-power "created by reason of any dam erected or other improvements made on any of said rivers", that its law was valid and its terms ample and unmistakable to confer *absolute ownership* of *all* water power so created, without respect to its ownership of land upon the banks, and that the entire and absolute control of the dam, embankments, canal and all appliances as well as of *the waters* was of vital interest to the State, it is difficult to discern how, in consonance with such doctrine, the State can be now held to have taken only the rights of a riparian proprietor, or why the owners of some parts of the shore below, who lost nothing but a diminution in the flow of

water along their banks possess superior right to challenge or abridge the State's enjoyment of all the attributes of absolute ownership and control beyond those other riparian proprietors who lost both shore and use of water in the construction of the improvement.

Clearly, as to the Kaukauna Water Power Company, now a defendant here and party then, the estoppel of the former litigation would appear complete and sufficient; and the others can take no better result but by successful gainsaying of the principles then expounded and established.

5. No just ground to impeach the validity of the Act of 1848 in the interest of riparian proprietors appears, therefore, to exist. No new reason not fully before this Court when it formerly upheld that act seems to be presented; or, if any new aspect of the facts be claimed, there is not to be found in them now, more substantial attack upon the constitutional power of the legislature. Rightfully and in good faith undertaking the improvement with the aid and at the instigation of the Federal Government and invested therefor with all its authority over this highway of interstate commerce, owning then the bed and waters of the stream with all privileges of riparian proprietors therein subject wholly to its own definition, it was competent for the state to establish the legal results and rights which should attach to it in every particular, and the law it enacted for the purpose goes with its use and ought to be fairly interpreted and applied to give effect to its purposes.

Its terms were plain in their meaning and ample to cover the rights now asserted under it. It defined the water-powers reserved to be such *as were created* by reason of dams or other improvements; nothing less. No exception or limitation can be imposed not obviously contrary to its fair intendment. To now assert any, much more a destructive one, does violence to the law in its words and purpose, to the contract between the State and its grantee, and to the vested rights which the General Government assured to the plaintiff-in-error, subject only to its own superintending control.

The Green Bay and Mississippi Canal Company may

be, as a corporation insensible to feeling, open to the assaults of all who would reap gains in the field which now begins to show promise of some return to its long and persistent labors and expenditures, and entitled to no sentiment of consideration at their hands. But by the hand of impartial justice it cannot be plucked and plundered of its just rights. It took up the work of this improvement when it was sinking to utter failure and decay. It took it up at a time when so small were the manufacturing interests of the West that only after the lapse of many years could the most sanguine hope expect realization of returning recompense with all the mischances of intervening time to encounter. It turned over the entire property to the General Government upon its demand, subject to the loss of a round million of dollars of its expenditures upon it, with only the possibilities of these water powers to cling to for remuneration in some distant future. It has persistently and faithfully striven through these many years to induce, by offer of small rentals and every available means, the establishment of factories from whose success its returns must be derived, and the rich and prosperous community that now peoples the Fox river valley is in no small degree the beneficiary. As its prospects began to brighten and the value of these powers responded with greater promise to its efforts, ingenuity has aimed attack and assault upon its rights which have been by these litigations long held in abeyance and its receipts have been abridged by the natural deterrence they cause. Finally, by the judgment under review, it stands threatened with their practical destruction.

When these riparian proprietors first began in 1879 the exercise of their asserted rights they were in full witness of all the facts in the history of the improvement and of the long enjoyment by the plaintiff's lessees of the privileges they now seek to take to themselves; they had equal knowledge of *the law* which had so long before given and defined the plaintiff's rights; and they built their dams and mills in the face of conditions which necessarily diminished the flow of the river and restricted their opportunity for enjoyment of its power. No encroachment or surprise has been put upon them,

and they would seem to have no standing in a court of justice to destroy the powers and privileges which the plaintiff so justly possesses to the satisfaction and with the sanction of the Government which owns and is entitled to control this improvement.

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